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## A CHAPTER OF LEGAL HISTORY IN MASSACHUSETTS.

THE matter of which I shall write has to do with the competency of witnesses. The main features of the common-law doctrine on this subject, the general course of its development, and the fact of its substantial disappearance in England and elsewhere, are fairly well known. To these matters, therefore, and the history of them, I need merely allude, — to the ancient common-law jury, at once witnesses and triers; to their necessary qualifications, determined by those of witnesses in the canon law;<sup>1</sup> to the slow coming in and the strange development of the practice of receiving witnesses to testify to these juries;<sup>2</sup> to the simple beginnings of the rules relating to the disqualification of these new witnesses, not at all identical with the disabilities of the civil or canon law, and so not the same as those of jurymen, but originating quite naturally in the requirement of an oath, in natural incapacity, in proved untrustworthiness, and in great and obvious danger of perjury; to the working out of these rules in the course of the seventeenth and eighteenth centuries into technical details which greatly perplexed the administration of justice; to the advent of Bentham, and his keen and truculent attacks upon the system;<sup>3</sup>

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<sup>1</sup> Glanville, II. c. 12; Bracton, p. 185; Ayliffe, Parergon Jur. Can. Angl. (1st ed.), 536; Oughton, Ord. Jud. (1738) 156; 3 Bl. Com. 361-364.

<sup>2</sup> 5 HARVARD LAW REVIEW, 249, 295, 357.

<sup>3</sup> The first publication of his writings on this subject was in Paris in 1823. *Traité des Preuves Judiciales. Ouvrage extrait de M. Jérémie Bentham, Jurisconsulte Anglais,*

and finally to the melting away in England of almost the whole fabric, under the attacks of Bentham and his followers, during the period between 1833 and 1853 inclusive. Of all these things I will merely remind the reader, and will pass on.

In Massachusetts, as regards the competency of witnesses, we have had for nearly twenty-five years as clean a sheet, probably, as the world affords. The law stands thus: <sup>1</sup> "No person of sufficient understanding, whether a party or otherwise, shall be excluded from giving evidence as a witness in any proceeding, civil or criminal, in court, or before a person having authority to receive evidence, except in the following cases: First. Neither husband nor wife shall be allowed to testify as to private conversations with each other. Second. Neither husband nor wife shall be compelled to be a witness on any trial upon an indictment, complaint, or other criminal proceeding, against the other. Third. In the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, a person so charged shall, at his own request, but not otherwise, be deemed a competent witness; and his neglect or refusal to testify shall not create any presumption against him." I take this from the Public Statutes of Massachusetts, the compilation now in use. It varies from the original statute of 1870 only by the insertion, in the first line, of the words, "whether a party or otherwise." These provisions do not apply to "the attesting witnesses to a will or codicil," — a class of persons, it will be observed, who are required in order to constitute the document, and not merely to give evidence in court.

Although this statute uses the words, "except in the following cases," the cases named are really not exceptions. The first provision as to husband and wife is only a limitation of the range of their testimony; the second secures a privilege; and the third, relating to accused persons, like the second merely secures a privilege.

It may be well to add that the Massachusetts statute also provides that conviction of a crime (any crime) and disbelief in a God may be given in evidence to affect a witness's credit; that

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*par Et. Dumont, etc.* 2 vols. This appeared in an English translation in 1825; and in 1827, John Stuart Mill's edition of Bentham's entire treatise on "The Rationale of Judicial Evidence" was published, in five volumes. It takes a good deal of courage to read it.

<sup>1</sup> Stat. 1870, c. 393, s. 1; approved June 22. Pub. St. Mass. c. 169, s. 18.



a party calling his adversary as a witness shall have "the same liberty in the examination of such witness as is allowed upon cross-examination;" and that "the usual mode of administering oaths now practised here, with the ceremony of holding up the hand [no book being used] shall be observed; . . . [yet] when a person declares that a peculiar mode of swearing is, in his opinion, more solemn and obligatory than by holding up the hand, the oath may be administered in such mode."<sup>1</sup> A Quaker may "solemnly and sincerely affirm, under the pains and penalties of perjury," and so may any one who declares (and satisfies the court) that "he has conscientious scruples against taking any oath;" and so *must* he who is "not a believer in any religion." He who believes in a religion other than the Christian, "may be sworn according to the peculiar ceremonies of his religion, if there are any such."<sup>2</sup>

In Massachusetts then, all the common-law grounds of witness-exclusion have disappeared: lack of religious belief, pecuniary interest, being a party to the suit or a party's husband or wife, and conviction of an infamous crime; — all, except the lack of natural capacity.

1. As to religious belief and the oath. In this respect, as in others, the change was slow. The two colonies, at Plymouth and Massachusetts Bay, were much distressed by two peculiar classes of people, Quakers and Indians. They regarded the first of these for a long time as the worst sort of intruders, as bringers of a sort of spiritual small-pox; and struggled to be wholly rid of them. To relieve them from the pressure of any hardship, by dispensing, for example, with the necessity of an oath, would have been the last thing likely to be thought of; the effort was to drive them out. In England the Quakers had some relief as early as 1695. It had been found there, after a long contest, that the Quaker was a sort of person who could not be killed off, or put

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<sup>1</sup> This clause covers the case of some Roman Catholics. See the explanation of the court to Bishop Fenwick, when he inquired why it was proposed to adopt in his case a method different from the usual one: viz. "It is well understood, as matter of general notoriety, that those who profess the Catholic faith are usually sworn on the Holy Evangelists, and generally regard that as the most solemn form of oath, and for this reason alone that mode is directed in this court, in case of administering the oath to Catholic witnesses. This is done by the witness placing his hand upon the book whilst the oath is administered, and kissing it afterwards." The Reporter adds; "The oath was then administered to Bishop Fenwick in this form." *Com. v. Buzzell*, 16 Pick. 153, 156 (1834).

<sup>2</sup> Pub. St. Mass., c. 169, ss. 13-31 inclusive.

down, or driven out; he had to be lived with. Here it took longer to find that out. Such well-intending people as these would indeed, here and there, melt in among their neighbors, like other people; and it seems to have required some effort on the part of the authorities to adhere to the orthodox view about them. While, therefore, in the Plymouth Colony, in 1657 and 1658, laws were passed prohibiting and punishing the bringing in or entertaining of Quakers, laws of the same period appear to have recognized some of them as freemen. And although in 1661 several penalties, including whippings, were again imposed on new-comers, yet in 1681 it was enacted, on petition of "several of the ancient inhabitants of the town of Sandwich, called Quakers," that they should have "liberty to vote in the disposal of such lands, and . . . to vote for the choice of raters, and shall be capable of making of rates, if legally chosen thereunto by the town and persons aforesaid, so long as they carry civilly and not abuse their liberty."<sup>1</sup>

Quakers, like all others, were early required in the Plymouth colony to take the oath of allegiance, "the oath of fidelity" as it was called, and on refusal were, at first, ordered to leave, and afterwards regularly fined, on being summoned "at each election," five pounds on each refusal.<sup>2</sup> It was not until 1719, long after the union of the colonies, that Quakers were allowed to substitute for the oath a solemn declaration of allegiance.<sup>3</sup> On March 5, 1743-4, by a law limited to three years Quakers were, for the first time, allowed, "upon any lawful occasion," instead of taking an oath, to "solemnly and sincerely affirm and declare under the pains and penalties of perjury;" but they could not do this in criminal cases, as witnesses or on any juries, nor could they, in general, hold any office where an oath was then required.<sup>4</sup> This law was afterwards renewed for ten years, and, in 1759, it was permanently enacted and made applicable also to criminal cases.<sup>5</sup> Finally, by Stat. 1810,

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<sup>1</sup> Plym. Col. Rec., vi. 71. In following the course of events, it may be well to notice that George Fox, the Founder of the Quakers, was born in 1624, and began to preach about 1648.

<sup>2</sup> Plym. Col. Laws, 76, 130.

<sup>3</sup> Province Laws, ii. 155.

<sup>4</sup> Province Laws, iii. 126. It is interesting to see by other parts of this statute that provisions had become necessary for cases when a majority or all of "the assessors or collectors of any town" shall be Quakers.

<sup>5</sup> Province Laws, iv. 180. A passage from the diary of Chief Justice Lynde as to a case before him in Nantucket in July, 1737, shows that Quakers then served on grand



c. 127 (February, 1811), Quakers were allowed to affirm on all occasions.

How was it with him who was not a Quaker, but had like scruples? After the familiar way of legislators, no general principle was applied till later. Probably there were few cases of trouble. One such occurred as late as 1815,<sup>1</sup> when Judge Story committed for contempt a witness, not a Quaker, who refused from conscientious scruples to take the oath. It was the St. 1824, c. 91 (P. S. c. 169, s. 16), which first allowed to others the liberty earlier gained by the Quakers, whenever "required to take any oath on any lawful occasion." The constancy of that God-fearing people had its final victory at last, in working out freedom of conscience for all.

The case of that other class of persons mentioned above, the native Indians, was also a troublesome one. They could not be expelled; they also must be lived with. The religious condition of these people, "the veriest ruins of mankind upon the face of the earth," as one of the clergy called them, was a puzzle to the colonists.<sup>2</sup> Saving the scanty converts, they seem to have been regarded either as wholly destitute of religion or as worshippers of false gods, and even of that peculiarly dangerous false god, the devil.<sup>3</sup> How could an oath be administered to such persons? Could the Pilgrim or the Puritan allow before his magistrates the invocation of Baäl or of Satan? or the swearing in of one who knew no God at all?

juries; and in some cases, apparently, without taking the oath: "13th Wednesday, in the morning about ten, in Mr. White's meeting-house, began the trial of Abia. Comfort, an Indian woman, against whom a bill of indictment was drawn up and presented . . . to the Gr. Jury, whereof Joseph . . . was appointed foreman, with eleven more Englishmen, but he and most Quakers; yet on the Court's having their hats off, and manifesting the decency of their's too, they, some of themselves, and others easily submitted to their being taken off, and had the Gr. Jury's oath or declaration administered to them, some holding up their hands."

<sup>1</sup> U. S. v. Coolidge, 2 Gallison, 364. A similar case in England is mentioned as occurring in 1854. Powell, Evidence (3d ed.), 29.

<sup>2</sup> Palfrey, Hist. New Eng. i. 43-50.

<sup>3</sup> "And it is ordered that no Indian shall at any time *Powaw* or perform outward worship to their False Gods or to the Devil, in any part of our jurisdiction, whether they shall be such as shall dwell here or shall come hither; and if any shall transgress this law, the *Powawer* shall pay five pounds, the procurer five pounds, and every other countenancing by his presence or otherwise (being of age of discretion), twenty shillings; and every town shall have power to restrain all Indians that shall come into their towns from profaning the Lord's day." This was a Massachusetts statute of 1633, preserved in the "Laws of 1660" (Whitmore's ed., Boston, 1889), Part II., 163. A similar provision is found in the Plymouth Col. Laws, 298, "Laws of 1671."

Evidently not. And yet there was constant occasion for Indian testimony. For example, Zachariah Allin, of the Plymouth Colony, was convicted, in 1679, "by the testimony of sundry Indians," of having supplied them "with some quantities of strong liquors."<sup>1</sup> Although this was a trial by jury, yet it is expressly said to have been according to "Chapter 14th of our Book of Laws, section the 7th." Turning to this<sup>2</sup> we find that "It is ordered that the accusation, information, or testimony of any Indian or other probable circumstance, shall be accounted sufficient conviction of any English person or persons suspected to sell, trade, or procure any wine, cider, or liquors above said, to any Indian or Indians, unless such English shall, upon their oath, clear themselves from any such act of direct or indirect selling; . . . and the same counted to be taken for conviction of any that trade any arms or ammunitions to the Indians." This procedure was enacted in the Massachusetts Colony in 1666, in the Plymouth Colony in 1667, and later in the Province, in 1693-4.<sup>3</sup> While, as in Allen's case, it might be combined with a jury trial, this was really "trial by oath," a very ancient thing.<sup>4</sup> A touch of it may be seen, in Massachusetts, under a statute relating to usury, Stat. 1783, c. 55, as explained by Shaw, C. J., in *Little v. Rogers*, 1 Met. 108, 110 (1840).

What was thus called in the books Indian "testimony," was probably not under oath. In the sort of case just referred to, the Indian merely made a criminal accusation. How was it in civil cases? An answer is found in a Plymouth law of 1674,<sup>5</sup> where, after reciting that many controversies arise between English and Indians, and that Indians "would be greatly disadvantaged if no testimony should, in such case, be accepted but upon oath," "it is ordered that any court of this jurisdiction before whom such trial may come, shall not be strictly tied up to such testimonies on oath as the common law requires, but may therein act and determine in a way of Chancery, valuing testimonies not sworn on both sides according to their judgment and conscience." In March 1679-80, in *Dexter & wife v. Lawrance*, (7 Plym. Col. Records, 222, 223) in an action of trespass on land of the female plaintiff, purchased

<sup>1</sup> Plym. Col. Records, vii. 242, 247.

<sup>2</sup> Plym. Col. Laws, 290; Plym. Col. Rec., xi. 234, 235.

<sup>3</sup> Plym. Col. Rec., xi. 219, 256; Plym. Col. Laws, 152; 4 Mass. Rec., Part II., 297; Whitmore's edition of Mass. Laws of 1660 and Supplements, Part II., 236; 1 Prov. Laws, 151.

<sup>4</sup> 5 HARVARD LAW REVIEW, 57-63.

<sup>5</sup> Plym. Col. Records, xi. 236; Plym. Col. Laws, 171.



by her of an Indian, the jury's verdict ran thus: "If Indian testimony be good in law, we find for the plaintiff five shillings damage and the cost of the suit; but if not good in law, we find for the defendant." It is added: "The charges of the suit is three pound, which was ordered by the court to the plaintiff." It seems a fair interpretation that this means judgment for the plaintiff, and so a holding that "Indian testimony" was good in law. It will be observed that the suit was between white persons, and that the statute related only to controversies between whites and Indians.<sup>1</sup>

In *Smith v. Freelove* (7 Plym. Col. Rec. 255, 256), in 1682, in an action of trespass relating to Hog Island in Plymouth, while John Alden, "aged eighty-two years, . . . being one of the first comers into New England to settle at or about Plymouth, which now is about sixty-two year since," in giving his testimony is regularly sworn, — four "ancient Indians . . . do affirm and testify" merely, the magistrate certifying that these "testimonies was subscribed to and declared to be the real truth."

There are instances, and probably many of them, in the court records of the Province, in the eighteenth century, where Indian testimony was introduced. In some the memorandum is added, "Sworn in court," and "Attested in court." In some it is merely described as "testimony." And again, as in the deposition of "Hepsabe Seeknout, widow of Joshua Seeknout, late Sachem of Chappaquiddick, dated Oct. 1, 1717, it is said to be "taken in court and spoken as in the presence of God." We may observe this same form of injunction formerly given in England to witnesses brought forward by one on trial for treason or felony, none of whom could be sworn until 1695, in high treason, and 1702 in felony.<sup>2</sup> "Look you here, friend," said Chief Justice North, in 1681, at the trial of College for high treason, when the accused called one of his witnesses, "you are not to be sworn; but when you speak in a court of justice you must speak as in the presence of God, and only speak what is true."<sup>3</sup>

It may be added, that in criminal trials and inquests where

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<sup>1</sup> In Rhode Island, in 1673, the General Assembly, after directing the trial of an Indian charged with murdering another Indian, by a jury of "six Englishmen and six Indians," ordered "that, in all cases of this nature wherein one Indian hath a complaint against another Indian, the testimony of an Indian may be taken, and in the judgment of the jury to accept or refuse the evidence as it were the testimony of an Englishman."

— 2 R. I. Col. Rec. 509.

<sup>2</sup> Stat. 7 Wm. III. c. 3, and Stat. 1 Ann. c. 9; 2 Hale, Pl. Cr. 283.

<sup>3</sup> 8 How. St. Tr. 626.

Indians were concerned, there was a common practice of adding Indians to the jury, much as witnesses to deeds were added to juries in the old days of the English law, but for a different reason.<sup>1</sup> In June, 1675, in the Plymouth Colony, three Indians were tried for the murder of another Indian and convicted. The names of the twelve jurors are given,<sup>2</sup> and it is added: "It was adjudged very expedient by the court that together with the English jury above named, some of the most indifferentest, gravest, and sage Indians should be admitted to be with the said jury, and to help to consult and advise with, of, and concerning the premises. [Then follow their names.] These fully concurred with the above written jury." The verdict was guilty; it began: "We of the jury, one and all, both English and Indian, do jointly and with one consent agree upon a verdict," &c.<sup>3</sup>

While converted Indians might of course be sworn, it is, I believe, matter of conjecture how far, if at all, unconverted Indians were formerly admitted to the oath in Massachusetts. They were either "worshippers of false gods" or atheists. The latter could not testify here until 1859. The former, after the case of *Omichund v. Barker*,<sup>4</sup> in 1744-45, might have testified under the forms recognized in their religion, when they had any; and it may be that a search in our Judicial Records under the Province will reveal instances of that practice. I know of no clear case.<sup>5</sup>

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<sup>1</sup> 5 HARVARD LAW REVIEW, 302.

<sup>2</sup> 5 Plym. Col. Rec. 168.

<sup>3</sup> A like case, in 1682, is found in Plym. Col. Rec. vi. 98, the case of an Indian indicted for rape on a white girl. The names of the twelve jurymen are given; "unto which English jury four Indian men present were added, viz;" etc. In Chief Justice Lynde's Diary, under date of June 14th, 1732, he speaks of holding court at Nantucket with a "grand jury of eighteen, a 3d Indians." Bills of indictment against several Indians were under investigation. Again, on July 13, 1737, it appears that the grand jury of twelve, mostly Quakers, above mentioned (p. 4, n. 5), had also four Indians added to their number, and they found *billa vera* against an Indian woman charged with murder for concealing the death of a bastard child.

<sup>4</sup> 1 Atk. 21; s. c. 2 Eq. Cas. Ab. 397; Willes, 538.

<sup>5</sup> The opportunity for such a search will soon exist when the thorough and admirably devised work of collecting, arranging, and indexing our early judicial records, now going forward under the direction of John Noble, Esq., Clerk of the Supreme Judicial Court for the County of Suffolk, shall have been completed. To his courtesy I am indebted for a number of the references here used. I must not omit to mention that courts were established among the Indians, in some cases, at their request, and Indians were appointed to try small causes among their people. Mass. Records, ii. 188 (1647). Chief Justice Lynde in his Diary (p. 28) speaks of visiting an Indian magistrate at Nantucket, in 1732, — Corduda, "a good and strict old man." It is not necessarily to be concluded that any oath was administered to the unconverted. But I observe



In *Omichund v. Barker*, it was declared to be the common law of England that heathens (in that case, native Hindoos) might testify when sworn according to the forms and ceremonies required by their own religion; on the principle that no more was essential for an oath, than that witnesses should "believe in a God, and that he will punish them if they swear falsely."<sup>1</sup> The doctrine was there laid down that it was not necessary to believe in a future existence, but only in a God who will punish in the present state; that greater credit might be given to a witness who believed in divine punishments hereafter;<sup>2</sup> and that "such infidels, if any such there be, who either do not believe in a God,<sup>3</sup> or, if they do, do not think that he will either reward or punish them in this world or in the next, cannot be witnesses in any case nor under any circumstances." This case, therefore, disposed of all difficulties, growing out of the form of the oath, or the ceremonies accompanying it, in the case of all sorts of persons whose religious belief made them amenable to any kind of an oath.

It is to be remembered, of course, that before the case of *Omichund v. Barker*, and even long before it, the practice of the courts may have conformed to the doctrine there laid down. That case itself only confirmed the action of Lord Hardwicke in ordering the taking of a deposition in 1739. And another instance of the same sort in the Privy Council is reported by Sir John Strange, as of Dec. 9, 1738.<sup>4</sup> "On a complaint of Jacob Fachina against General Sabine as Governor of Gibraltar, Alderman Ben Monso, a Moor, was produced as a witness and sworn upon the Koran. I made no objection to it."<sup>5</sup>

After the Revolution,<sup>6</sup> a statute was passed that "In the administration of oaths in this Commonwealth, the ceremony of lifting up

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that where Indians were a part of coroners' juries, upon the death of an Indian, the verdict in some cases expressly says that it is under oath, and no qualification is made as to the Indians. Such a case occurred at Barnstable in 1720, and at Yarmouth about the same time. It may be conjectured that, as time went on, Indians would generally be admitted to the oath when they did not object, on a presumption of their being converted, or, at any rate, of their recognizing its obligation.

<sup>1</sup> *Per* Willes, C. J., Willes Rep. at p. 549.

<sup>2</sup> And so *Hunscom v. Hunscom*, 15 Mass. 184 (1818). Compare the note to that case, as to the English law.

<sup>3</sup> So *Thurston v. Whitney*, 2 Cush. 104.

<sup>4</sup> 2 Strange, 1104.

<sup>5</sup> Compare a case of swearing a Jew on the Old Testament, in 1667-8, *Robely v. Langston*, 2 Keble, 314.

<sup>6</sup> Stat. 1797, c. 35, s. 10.

the hand, as heretofore used, shall be practised, with such exceptions as to Mahometans and other persons who believe that an oath is not binding unless taken in their accustomed manner, as the several courts shall find necessary in the execution of the laws." The practice under this statute appears to have been liberal, and to have followed that of the English court in *Colt v. Dutton*, 2 Sid. 6 (1657), in allowing a variation from the common form, not merely where this was thought not binding, but where it was thought less solemn. And so the court was able to answer the Roman Catholic Bishop as it did in 1834.<sup>1</sup> This practice was sanctioned by Rev. Stat. c. 94, s. 8 (Nov. 1835), allowing it "when the court . . . shall be satisfied" of a witness's belief as to the greater solemnity of another form, — changed by Stat. 1873, c. 212, s. 1, to "when a person . . . shall declare."<sup>2</sup>

Regarding the Indians as atheists, they would regularly have been wholly excluded from giving testimony; for atheists, as I have said, were not admitted to testify in this State until the enactment of the General Statutes (Dec. 28, 1859), where it was provided (c. 131, s. 12; now Pub. St. c. 169, s. 17), that "every person not a believer in any religion shall be required to testify truly under the pains and penalties of perjury."<sup>3</sup> But the politic and sensible arrangements about Indians which were actually adopted have been already stated. For such an exception there was not only the usage as to the witnesses of persons accused of high treason or felony, mentioned above (p. 7), but there was the nearer analogy of children too young to take an oath, in rape cases.<sup>4</sup> This practice as to young children was, indeed, declared bad, by a divided court, in *Powell's Case*, Leach (4th ed.), 110 (1775), and by a unanimous court in *Brasier's Case*, ib. 199 (1779). But it has recently been revived in England, by statute, in a similar class of cases.

2. Passing from the oath and the religious disabilities to those arising from a pecuniary interest in the litigation and from legal

<sup>1</sup> *Com. v. Buzzell*, 16 Pick. at p. 156; *supra*, p. 3, n. 1. Compare *Vail v. Nickerson* 6 Mass. 262 (1810) and *Bonnier, Preuves* (4 ed.), i. ss. 420, 424.

<sup>2</sup> And so now in Pub. Stat. c. 169, s. 14. Rev. Stat. c. 94, s. 11, had also introduced the express provision previously mentioned, that believers in any other than the Christian religion might be sworn according to any peculiar ceremonies of their religion.

<sup>3</sup> In England, this was partly accomplished in 1854 by Stat. 17 and 18 Vict. c. 125, s. 20; it was completed in 1869, by Stat. 32 and 33 Vict. c. 6, s. 4. See the later comprehensive statute of 1888, Stat. 51 and 52 Vict. c. 46.

<sup>4</sup> 1 Hale, Pl. Cr. 634; 2 ib. 279.



infamy, — these<sup>1</sup> were for the first time attacked and dealt with together in 1851, in the first Massachusetts Practice Act, a statute bringing about extensive reforms in civil procedure at common law. A commission, appointed in 1849 by the Governor, in pursuance of a joint legislative resolve of the same year, moved by B. R. Curtis, then a member of the Massachusetts House of Representatives, and consisting of himself, R. A. Chapman, afterwards Chief Justice of the State, and N. A. Lord, another distinguished lawyer, in a report of permanent value, addressed to the legislature of 1851, recommended, among many other things, the abolition of the disqualification of witnesses for crime or interest.<sup>2</sup> The commissioners were unwilling to admit parties to testify, but they proposed allowing the examination of parties, before the trial, upon written interrogatories. In making their propositions as to crime and interest, they said, referring to the English legislation of 1843, "We have been a good deal influenced by the course of legislation in England." At that time a measure for allowing parties to the litigation to testify had been pending in Parliament for two years, but was not yet adopted. It passed, however, in England, almost immediately afterwards, in the very year, 1851,<sup>3</sup> which saw the enactment of the commissioners' recommendations in Massachusetts. This Practice Act of 1851 (c. 233) was repealed the next year, in order to change some matters of detail, but was mainly re-enacted as Stat. 1852, c. 312; and in all respects material to the present discussion the two statutes were the same.<sup>4</sup>

3. The case of parties to the suit in civil proceedings was not disposed of until 1856. The Stat. 1856, c. 188, made them competent and compellable in all cases, with qualifications which were abolished from time to time. The case of the husband and wife of the party to a civil suit was dealt with in the Stat. of 1857, c. 305, and in later ones;<sup>5</sup> but the present simple rule which makes the husband or wife of a party competent and compellable in all civil proceedings, and competent but not compellable in all criminal proceedings, was not adopted till the Stat. 1870, c. 393.

<sup>1</sup> Abolished in England by Lord Denman's Act in 1843, Stat. 6 and 7 Vict. c. 85.

<sup>2</sup> Hall's Mass. Practice Act of 1851, 150-156.

<sup>3</sup> Stat. 14 and 15 Vict. c. 99. And see Stat. 32 and 33 Vict. c. 68 (1869).

<sup>4</sup> As regards interrogatories to parties before the trial, this convenient introduction of equitable discovery into common-law practice had long been known in some other States of this country. In England it was not introduced until 1854 by the Stat. 17 and 18 Vict. c. 125, s. 50 *et seq.*

<sup>5</sup> In England, in 1853, by Stat. 16 and 17 Vict. c. 83.

4. The admission of the accused person in all criminal proceedings, with the qualifications stated before (*supra*, p. 2), was allowed by Stat. 1866, c. 260. This remarkable inroad upon the common law had been first made in Maine by a statute of 1864, c. 280; and it has long been the law in most of our States. It was introduced in the Federal jurisdiction by a statute of March 16, 1878.<sup>1</sup>

The enactment in Maine of this sensible and very important change, not yet accomplished in England, is understood to have been principally due to the efforts of Chief Justice Appleton, an early disciple of Bentham, and author of a little treatise on Evidence, published in 1860. This book was largely a reprint of an early set of articles published thirty years earlier in the *American Jurist*,<sup>2</sup> eagerly advocating the English reformer's views. It was mainly Bentham's influence working through younger men, such as Denman, Brougham, and Taylor, the writer on Evidence, that overthrew so rapidly in England the system of witness exclusion. It was the English example that moved us. And as we see, it was the same powerful influence of Bentham that has finally carried the reform on this side of the water to a point not yet reached in his own country.<sup>3</sup>

*James Bradley Thayer.*

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<sup>1</sup> 20 U. S. Stat. at Large, 30.

<sup>2</sup> Beginning in Vol. IV. p. 286.

<sup>3</sup> "I do not know," says Sir Henry Maine, "a single law reform effected since Bentham's day which cannot be traced to his influence." *Early History of Institutions* (London, 1880), 397.



## THE USE OF MAXIMS IN JURISPRUDENCE.

"Maxims are the condensed Good Sense of Nations." — SIR JAMES MACKINTOSH (Motto on titlepage of Broom's Legal Maxims).

"*A maxime in law.*' A maxime is a proposition to be of all men confessed and granted without prooffe, argument, or discourse." — *Co. Litt.* 67 a.

"Maxime, *i. e.*, a sure foundation or ground of art, and a conclusion of reason, so called *quia maxima est ejus dignitas et certissima autoritas, atque quod maxime omnibus probetur*, so sure and uncontrollable as that they ought not to be questioned." — *Co. Litt.* 10 b-11 a.

"It seems to me that legal maxims in general are little more than pert headings of chapters. They are rather minims than maxims, for they give not a particularly great but a particularly small amount of information. As often as not, the exceptions and qualifications to them are more important than the so-called rules." — SIR J. F. STEPHEN: *History of the Criminal Law of England*, vol. 2, 94, note 1.

"We believe that not a single law maxim can be pointed out which is not obnoxious to objection." — TOWNSHEND on Slander and Libel, 4th ed., s. 88, p. 71, note 1.

HERE is certainly a remarkable difference of opinion. The truth is, that there are maxims and maxims; some of great value, and some worse than worthless. And the really valuable maxims are peculiarly liable to be put to a wrong use. A proposition, in order to gain currency as a maxim, must be tersely expressed. But the very brevity which gives it currency, also, in many instances, gives rise to misconception as to its meaning and application. A phrase intended to point out an exception may be mistaken for the enunciation of a general rule. An expression originally used only to state a truth may be mistaken for a statement of *all* truth; as comprising in half a dozen words a digest of the entire law on a given topic. As Agassiz was said to be able from the view of a single bone or scale to reconstruct the entire animal of which the fragment once formed a part, so jurists sometimes treat one brief maxim as containing all the materials needed to develop an entire subdivision of the law, "a complete pocket precept covering the whole subject."<sup>1</sup> How common it is to meet with decisions on important points, where the only hint at an expression of the *ratio decidendi* consists in the quotation, without comment, of a legal maxim! And, not unfrequently, a maxim implicitly relied on "as covering the entire subject" is one origi-

<sup>1</sup> 6 HARVARD LAW REVIEW, 437.

nally intended to have only a very limited application, and which "could only do duty as a general exposition by being strangely misinterpreted and strangely misapplied."<sup>1</sup>

Round numbers, it is said, are always false; and purely general criticisms are apt to be unfounded. Those who are wont to eulogize maxims may not unreasonably require their critics to "file a specification." In compliance with this request, we proceed to furnish specific criticisms of some specific maxims. And the objections to these maxims will be stated, so far as practicable, in the words of jurists of acknowledged reputation. One who has the temerity to attack popular idols can hardly expect even to obtain a hearing, much less to convince, if he relies solely on the views "evolved from his own inner consciousness." The convincing force, if any such there be, of this article will consist in its want of originality.

There are phrases, solemn and imposing in form, which seldom or never render any real assistance in the solution of a legal puzzle; but on the contrary actually retard that solution. They are mere truisms; or mere identical propositions; or moral precepts; or principles of legislation; but not working rules of law. "Such sentences are not a solution of a difficulty; they are stereotyped forms for gliding over a difficulty without explaining it."<sup>2</sup> And yet, being mistaken for solutions of the practical legal problem, their use has the effect of preventing a thorough investigation. Prominent in this class is the familiar maxim, *Sic utere tuo ut alienum non lædas*, and its companion phrase, *Qui jure suo utitur neminem lædit*. Perhaps no legal phrase is cited more frequently than *Sic utere*, &c. It is not uncommon for judges to decide important cases without practically giving any reason save the quotation of this maxim, which is evidently regarded by the court as affording, by its very terms, a satisfactory *ratio decidendi*. Yet in the vast majority of cases this use of the phrase is utterly fallacious.

"The maxim, *Sic utere tuo ut alienum non lædas*, is mere verbiage. A party may damage the property of another where the law permits; and he may not where the law prohibits: so that the maxim can never be applied till the law is ascertained; and, when it is, the maxim is superfluous."<sup>3</sup>

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<sup>1</sup> 6 HARVARD LAW REVIEW, 437.

<sup>2</sup> 8 Am. Law Rev. 519.

<sup>3</sup> Erle, J., in *Bonomi v. Backhouse*, El. Bl. & El. 622, p. 643.



"The maxim, . . . , is no help to decision, as it cannot be applied till the decision is made."<sup>1</sup>

"*Sic utere tuo ut alienum non lædas*: how can this duty be understood without first knowing the meaning of *tuum* and injury?"<sup>2</sup>

"The attempts to solve these difficulties, which one meets with in ordinary law books, are merely identical propositions, and amount to nothing: e.g., *Qui jure suo utitur neminem lædit*. If by *lædit* be meant damage or evil, it is false (and inconsistent with what immediately precedes); since the exercise of a right is often accompanied with the infliction of positive evil in another. If by *lædit* he meant *injury*, the proposition amounts to this; that the exercise of a right cannot amount to a wrong: which is purely identical and tells us nothing; since the thing we want to know is 'what is right? (or what is that which I may do without wrong?); and what is wrong? (what is that which would not be an exercise of my own right, inasmuch as it would amount to a violation of a right in another?).'"

"The same observations are applicable to *Sic utere tuo ut alienum non lædas*."<sup>3</sup>

"The maxim, *Sic utere tuo ut alienum non lædas*, is iterated and reiterated in our books, and yet there is scarcely an aphorism known to the law the true application of which is more vague and undefined. Interpreted literally it would enjoin a man against any use of his own property which in its consequences might injuriously affect the interests of others; but no such legal principle ever existed."

"While, therefore, *Sic utere tuo*, &c., may be a very good moral precept, it is utterly useless as a legal maxim. It determines no right; it defines no obligation."<sup>4</sup>

"The maxim *Sic utere tuo ut alienum non lædas*, as commonly translated ('So use your own as not to injure another's'), is doubtless an orthodox moral precept; and in the law, too, it finds frequent application to the use of surface and running water, and indeed generally to easements and servitudes. But strictly, even then, it can mean only, 'So use your own that you do no legal damage to another's.' Legal damage, actionable injury, results only from an unlawful act. This maxim also assumes that the injury results from an unlawful act, and paraphrased means no more than: 'Thou shalt not interfere with the legal rights of another by the commission of an unlawful act,' or 'Injury from an unlawful act is actionable.' This affords no aid in this case in determining whether the act complained of is actionable, that is, unlawful. It amounts to no

<sup>1</sup> Sir Wm. Erle, in *Brand v. H. & C. R. Co.*, L. R. 2 Q. B. 223, p. 247.

<sup>2</sup> 2 Austin on Jurisprudence, 3d ed. 795.

<sup>3</sup> 2 Austin on Jurisprudence, 3d ed. 829.

<sup>4</sup> Seldon, J., in *Auburn, &c. Co. v. Douglass*, 9 New York, 444, p. 445, 446.

more than the truism: An unlawful act is unlawful. This is a mere begging of the question; it assumes the very point in controversy, and cannot be taken as a *ratio decidendi*.”<sup>1</sup>

Various defences of this maxim have been attempted.

It is said that the objection urged by Sir William Erle “may be made against all legal maxims and rules; none are absolute.”<sup>2</sup>

Undoubtedly, every legal principle is frequently liable to be modified in its operation by the concurrent application of some other legal principle or principles. The effect of the particular principle is curtailed or extended (as the case may be) by bringing another principle into combination with it, “so that the two together will produce a result not within the terms of either one alone; as two diverse propelling forces, applied to an inert body, will send it to a point which neither one of itself would do.”<sup>3</sup> “What is thought to be an exception to a principle, is always some other and distinct principle cutting into the former; some other force which impinges against the first force, and deflects it from its direction.”<sup>4</sup> But a legal principle which deserves its place will always be of appreciable value in the solution of problems falling within its scope, whenever it is not controlled by some other principle which, under the circumstances of the case, is entitled to superior weight. And it is precisely here that the defence of this maxim labors. It is frequently used as affording a solution of a legal problem, which in fact it never solves.

It is also asserted that this maxim, though it may often have been made to do “extra legal duty,” is, really, “indispensable in the place where it belongs, and that is in case of concurrent rights, whether equal or different in degree, in respect to the same property.” “Here,” it is said, “the maxim is the boundary, and does determine the right and define the obligation of the parties, as between each other, in the use of their respective estates.”<sup>5</sup>

This argument is not well founded. The maxim does not, even in that class of cases, “determine the right or define the obligation of the parties, as between each other.” At the utmost it merely asserts that certain rights of property are not absolute but relative, that the right of one man is limited by the correlative

<sup>1</sup> Ingersoll, Sp. J., in *Payne v. W. & A. R. Co.*, 13 Lea, Tennessee, 507, p. 527, 528.

<sup>2</sup> 1 Am. Law Rev. 5.

<sup>3</sup> Bishop on Written Laws, s. 118*a*.

<sup>5</sup> 7 Alb. Law Journal, 32.

<sup>4</sup> Mill on Logic, Harper's ed. of 1850, p. 259.



right of another. But it does not tell us how far, or to what extent, the limitation goes. If it be said (as seems to be practically asserted in one quarter) that it is impossible to give any serviceable, working definition of these correlative rights, why not frankly confess the impotency of the law in this regard, instead of deluding people into the belief that the law furnishes, in this maxim, a rule capable of easy and definite application? If this maxim means only, "Do not take more than your share of a common right," why parade it as solving the question what that share is? Say, if you please, as one court has virtually said, that the question is one of reasonableness of use, and that this is a question of fact for a jury.<sup>1</sup> But does it follow that the recitation of the *sic utere* maxim by the judge will constitute an all-sufficient guide to the jury?

Of what value, then, is this maxim; what reason is there for retaining it in the law books?

Professor Terry answers: It belongs to the class of "extra-legal principles — which we may call legislative, because they serve as guides to show how the law ought to be made. . . . Much the greater part of the work of the courts has been done by taking what were really extra-legal principles, of justice or policy proper for the consideration of the Legislature, treating them as rules of law, and then, under the pretence — not always consciously false — of interpreting them and applying them to particular cases, making new rules of law based upon them. . . . If we . . . take up any collection of legal maxims, we shall find that many, perhaps most, express principles of legislation rather than law. . . . The familiar maxim, *Sic utere tuo ut alienum non lædas*, is another one of the same character. There cannot be said, I think, to be any general rule of law forbidding a person to cause damage to another by the manner in which he exercises his own rights. But the principle expressed in the maxim has been the guiding principle in the evolution of many more special rules forbidding various kinds of conduct which are likely to produce harm to others."<sup>2</sup>

Again, there are maxims, which, if true at all, are true only in a partial sense, and which must be essentially limited in their application. Yet these maxims are frequently cited as if literally true and universally applicable. Take, for instance, the phrase, *Equitas*

<sup>1</sup> *Swett v. Cutts*, 50 N. H. 439; *Bassett v. S. M. Co.*, 43 N. H. 569; *Rindge v. Sargent*, 64 N. H. 294.

<sup>2</sup> Terry's *Leading Principles of Anglo-American Law*, ss. 10, 11.

*sequitur legem*, which is sometimes quoted as if it possessed "a supreme and controlling efficacy."

This rule "if followed literally, would leave nothing for the courts of equity to perform."<sup>1</sup> But in fact "the main business of equity is avowedly to correct and supplement the law."<sup>2</sup> "The qualification of this maxim is nothing less than the entire system of juridical equity itself, both jurisprudence and procedure, based, as has been seen, upon the theory that equity does not follow the law where the law does not follow justice or the public convenience."<sup>3</sup> Equity follows the law in its rules of decision only "when it does not choose to follow differing rules of its own."<sup>4</sup>

"Throughout the great mass of its jurisprudence, equity, instead of following the law, either ignores or openly disregards and opposes the law. . . . One large division of the equity jurisprudence lies completely outside of the law; it is additional to the law; and while it leaves the law concerning the same subject-matter in full force and efficacy, its doctrines and rules are constructed without any reference to the corresponding doctrines and rules of the law. Another division of equity jurisprudence is directly opposed to the law which applies to the same subject-matter; its doctrines and rules are so contrary to those of the law that when they are put into operation the analogous legal doctrines and rules are displaced and nullified. As these conclusions cannot be questioned, it is plain that the maxim, 'Equity follows the law,' is very partial and limited in its application, and cannot . . . be regarded as a general principle."<sup>5</sup>

There are historical reasons which account for the frequent use of this maxim in early times.<sup>6</sup> And there are, undoubtedly, cases, neither few in number nor unimportant, where courts of equity follow common law analogies.<sup>7</sup> But "the maxim is, in truth, operative only within a very narrow range; to raise it to the position of a general principle would be a palpable error."<sup>8</sup>

It is hardly too much to say that, at the present day, there is as much ground for asserting the reverse of this maxim as for assert-

<sup>1</sup> 2 Austin on Jurisprudence, 3d ed. 668.

<sup>2</sup> Phelps' Juridical Equity, s. 237.

<sup>3</sup> Phelps' Juridical Equity, s. 239.

<sup>4</sup> 1 Bishop, Law of Married Women, s. 16.

<sup>5</sup> 1 Pomeroy's Equity Jurisprudence, 1st ed. s. 427.

<sup>6</sup> See Phelps' Juridical Equity, s. 237; also 1 Pomeroy's Equity Jurisprudence, 1st ed. s. 425.

<sup>7</sup> 1 Pomeroy's Equity Jurisprudence, 1st ed. ss. 425, 426.

<sup>8</sup> 1 Pomeroy's Equity Jurisprudence, 1st ed. s. 427.



ing the maxim itself. *Lex sequitur equitatem* would apply about as often as *Equitas sequitur legem*. Many doctrines of the modern common law "seem grounded on the fact that similar decisions had previously been made in courts of equity." It is impossible to deny "the constant progress of law in the direction of equity under the superior attractive force of the latter;"<sup>1</sup> a tendency the existence and justice of which found recognition in the provision of the English Judicature Act of 1873: That when equity and common law conflict, equity shall prevail.<sup>2</sup> Indeed, the adoption by the common law of many doctrines which were originally purely equitable, has been so complete that it has often been seriously, though unsuccessfully, contended that the jurisdiction originally exercised by courts of equity in like cases should now be regarded as abrogated.<sup>3</sup>

If there is one maxim cited more frequently than another as being both fundamental in its nature and universal in its applicability, it is the phrase, *Actus non facit reum, nisi mens sit rea*; or, as it is sometimes expressed, *Non est reus, nisi mens sit rea*. No less a personage than the late Chief-Justice Cockburn affirmed that this maxim "is the foundation of all criminal justice."<sup>4</sup> Yet even this phrase has been severely criticised by a judge who had made a specialty of criminal law. And his comments from the bench cannot be regarded as mere sparks struck off in the heat of discussion; for the substance of his views had already been given in an elaborate work, published six years before his judicial utterance. In *Regina v. Tolson*, decided in 1889,<sup>5</sup> Mr. Justice Stephen said: "Though this phrase is in common use, I think it most unfortunate, and not only likely to mislead, but actually misleading, on the following grounds: It naturally suggests that, apart from all particular definitions of crimes, such a thing exists as a '*mens rea*,' or 'guilty mind,' which is always expressly or by implication involved in every definition. This is obviously not the case, for the mental elements of different crimes differ widely. '*Mens rea*' means, in the case of murder, malice aforethought; in the case of theft, an intention to steal; in the case of rape, an intention

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<sup>1</sup> Jickling on the Analogy between Legal and Equitable Estates and Modes of Alienation, Preface, x. xi.; Phelps' Juridical Equity, ss. 239, 167, 168.

<sup>2</sup> 36 and 37 Victoria, chap. lxvi. s. 25.

<sup>3</sup> 1 Pomeroy's Equity Jurisprudence, 1st ed. ss. 276-278, 182.

<sup>4</sup> *Reg. v. Sleep*, 8 Cox Cr. Cas. 472, p. 477.

<sup>5</sup> L. R. 23 Q. B. D. 168, p. 185, 186.

to have forcible connection with a woman without her consent; and in the case of receiving stolen goods, knowledge that the goods were stolen. In some cases it denotes mere inattention. For instance, in the case of manslaughter by negligence it may mean forgetting to notice a signal. It appears confusing to call so many dissimilar states of mind by one name. It seems contradictory, indeed, to describe a mere absence of mind as a '*mens rea*,' or guilty mind. The expression, again, is likely to, and often does, mislead. To an unlegal mind it suggests that, by the law of England, no act is a crime which is done from laudable motives; in other words, that immorality is essential to crime. . . .

"Like most legal Latin maxims, the maxim on *mens rea* appears to me to be too short and antithetical to be of much practical value. It is, indeed, more like the title of a treatise than a practical rule."<sup>1</sup>

In Sir J. F. Stephen's "History of the Criminal Law of England," published in 1883, it is said:<sup>2</sup>—

"The truth is that the maxim about '*mens rea*' means no more than that the definition of all, or nearly all, crimes contains not only an outward and visible element, but a mental element, varying according to the different nature of different crimes. . . . Hence the only means of arriving at a full comprehension of the expression '*mens rea*' is by a detailed examination of the definitions of particular crimes, and therefore the expression itself is unmeaning."<sup>3</sup>

Bacon's celebrated maxim relative to *ambiguitas latens* has already been sufficiently discussed in this journal. The maxim "figured as the chief commonplace of the subject for many years. It still performs a great and confusing function in our legal discussions." But Professor Thayer (who does not stand alone in this view) pronounces it "an unprofitable subtlety;" "inadequate and uninformative."<sup>4</sup>

A maxim which is really true, and useful in its place, may be overestimated; and the result is to stifle inquiry upon important points. Thus the phrase, *In jure, causa proxima, non remota*,

<sup>1</sup> In the same case, p. 181, Cave, J., speaks of this maxim as "somewhat uncouth," and Manisty, J., p. 201, expresses his concurrence with portions of the criticisms of Stephen, J.

<sup>2</sup> Vol. ii. p. 95.

<sup>3</sup> But compare Mr. Endlich's article on "The Doctrine of *Mens Rea*," 13 Criminal Law Magazine, 831; and 1 Bishop's New Criminal Law, ss. 287, 288, 303 a, note 6, paragraph 2.

<sup>4</sup> 6 HARVARD LAW REVIEW, 417-440; especially 424, 436, 437, 438.



*spectatur*, is by no means to be banished from the law. But it does not follow that the citation of this maxim, even with the addition of the first paragraph in Bacon's well-known gloss, will afford an all-sufficient statement of the reasons for every decision upon a question of juridical cause. The maxim may properly be used as a starting-point, but it should not be mistaken for the goal. It "does not help us to tell when a cause is proximate, and when remote."<sup>1</sup> Taken literally, it would seem to put material antecedents on an equal footing with voluntary and responsible human actors. So also it might be understood as implying that the antecedent which is "nearest in time or space" is invariably to be regarded as the legal cause.<sup>2</sup>

Maxims relating to the interpretation of written instruments occupy (with the comments upon them) more than one-seventh of Mr. Broom's book. Yet these maxims, standing alone and taken as absolute statements, are liable to gross misuse. Most of them are, at the utmost, only *prima facie* rules; "good servants, but bad masters." A rule of construction should always be understood as containing the saving clause, "unless a contrary intention appear by the instrument."<sup>3</sup>

So, too, there are maxims intended to be applied only as last resorts in emergencies; but which purport on their face to carry controlling weight under all circumstances. An illustration of this class is afforded in the following extract from the opinion of Finch, J., in the recent case of *Rapps v. Gottlieb*.<sup>4</sup>

"A further argument is made founded upon the doctrine that, where one of two innocent parties must suffer from a wrong, he must bear the loss whose action enabled the wrong to be done; but that doctrine applies only in an emergency. It solves problems which have no other solution; it supplies a ground of decision where all others are absent; it operates as a reason when nothing else can master the situation; it is a rule of last resort, applicable only where all others fail; it is a doctrine subordinate and not dominant, which reverses no other, but submits to the authority of all, and is adequate to an ultimate decision only when it has the field to itself. Any wider view of it would make it a disturbing force, tending to unsettle and destroy the most firmly fixed doctrines of the law. It is good and useful, — in its place, — but will always make

<sup>1</sup> 4 Am. & Eng. Encyclopædia of Law, 25, note.

<sup>2</sup> See Thomas, J., in *Marble v. Worcester*, 4 Gray, p. 409. Compare Cooley on Torts, 2d ed. 88.

<sup>3</sup> See Preface to Hawkins on Wills.

<sup>4</sup> 142 N. Y. 164, 168.

trouble if not kept where it belongs. . . . If it is always remembered that the doctrine as to innocence on both sides operates only when other solutions are not available, or possibly in aid of proper solutions, very much of needless confusion will be avoided."

There are phrases to be found in some collections of so-called legal maxims which were not intended by their original framers as statements of "law." They are "merely moral rules, which do not obtain as positive law."<sup>1</sup> Doubtless "the law rests its foundations on morality, but it does not cover all morality; . . ." and while there is "no conflict" between the rule of law and the rule of morals, "the latter is broader than the former."<sup>2</sup> A writer on jurisprudence may have enunciated as rules "whatever maxims of justice or utility approved themselves to him as an individual moralist."<sup>3</sup> It is sometimes difficult to discover whether such authors "are discussing law or morality;" "whether they lay down that which is, or that which, in their opinion, ought to be."<sup>4</sup> What they believe ought to be law is liable to be treated by them as if it were law already; although it has never been made the basis of judicial action, and is not soon likely to be. But a proposition can properly be called "law" only when, and so far as, it is enforceable by the courts.

In this connection it should be noticed that "many of the sayings that are dignified by the name of maxims are nothing but the *obiter dicta* of ancient judges who were fond of sententious phrases, and sometimes sacrificed accuracy of definition to terseness of expression."<sup>5</sup> Moreover, a statement intended as a maxim may have gained currency as such out of deference to the reputation of its author, rather than by reason of its intrinsic correctness as a faithful representation of existing law. Thus it has been said of Bacon's misleading maxim relative to *ambiguitas latens*: "The great name of the author of the maxim gave it credit. . . . When this was found clothed in Latin, and fathered upon Lord Bacon, it might well seem to such as did not think carefully that here was something to be depended upon."<sup>6</sup>

It is not unreasonable to suppose that the old sages, in some instances, intentionally overstated a truth for the purpose of attract-

<sup>1</sup> See J. S. Mill's Review of Austin on Jurisprudence, 118 Edinburgh Review, 161.

<sup>2</sup> Bishop's First Book of the Law, ss. 16 and 17. (It is to be regretted that this useful work should have been so long out of print.)

<sup>3</sup> 118 Edinburgh Review, 461.

<sup>4</sup> Maine's Ancient Law, 1st Eng. ed. 98.

<sup>5</sup> 3 New Jersey Law Journal, 160.

<sup>6</sup> 9 HARVARD LAW REVIEW, 437.



ing attention. "A certain pleasant exaggeration, the use of the figure hyperbole, a figure of natural rhetoric which Scripture itself does not disdain to employ, is a not unfrequent engine with the proverb for the arousing of attention and the making of a way for itself into the minds of men."<sup>1</sup> But, in making practical application of so-called legal maxims, sufficient care has not always been taken to distinguish between the exaggeration and the reality.

"Legal maxims do not change; they are the fundamental principles of law, and therefore no alterations in them can be noted. . . ." Such is the claim made in the preface to a recent collection of maxims.<sup>2</sup> This statement apparently assumes, first, that all prominent legal maxims are correct representations of fundamental principles of law; second, that these so-called "fundamental principles of law" never change. The first assumption is not well founded, as appears from the extracts we have already given from high authorities. Nor is the second assumption correct, unless the term "fundamental principles of law" is so defined as to restrict the class to a very small number. On some subjects the law crystallized too early. Courts attempted to lay down hard and fast rules, which it has been impossible to adhere to. Notwithstanding the efforts made by some tribunals to conceal the fact that the law was being altered by their decisions, it is undeniable that the law has been changed in respect to points formerly considered essential. In very recent times some judges have had the frankness to admit this. A "system of unwritten law," said Chief-Justice Cockburn, "has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied."<sup>3</sup> It cannot be questioned that some maxims which were once "law" are so no longer. They grew out of a state of society now happily obsolete. They are paraphrases of doctrines first adopted in barbarous ages, but which no longer obtain. Or they are deductions from those cast-off principles; "and the conclusions at which they arrive

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<sup>1</sup> "Proverbs, and their Lessons," by Archbishop Trench, 7th Eng. ed. 25.

<sup>2</sup> Wharton's Maxims, 2d ed., Preface, vi.

<sup>3</sup> *Wason v. Walter*, L. R. 4 Q. B. 73, p. 93. Compare the admirable opinion of Lord Hobhouse in *Smart v. Smart*, L. R. (1892), Appeal Cases, 425; which is throughout an illustration of the above statement.

being logical consequences of their imperfect principles, necessarily partake of the same defects."<sup>1</sup> At the present day, such maxims are not safe guides.

If the foregoing criticisms are well founded, how shall we account for the fact that various objectionable maxims keep their place in the books, and are daily quoted by eminent jurists. One answer to this inquiry is suggested by the remark of Sir Henry Maine, that "legal phraseology is the part of the law which is the last to alter."<sup>2</sup> The most ardent law reformers, in spite of the Scriptural warning against putting new wine into old bottles, sometimes prefer to give a new interpretation to an old phrase rather than attempt the almost "impossible task of blotting it out of our jurisprudence."<sup>3</sup> Even Austin, who did not hesitate to apply to some existing terms such an epithet as "jargon," is not inclined to unnecessarily "engage in a toilsome struggle with the current of ordinary speech."<sup>4</sup> "Mr. Austin," says John Stuart Mill, "always recognizes, as entitled to great consideration, the custom of language, — the associations which mankind already have with terms; insomuch that when a name already stands for a particular notion (provided that, when brought out into distinct consciousness, the notion is not found to be self-contradictory), the definition should rather aim at fixing that notion, and rendering it determinate, than attempt to substitute another notion for it."<sup>5</sup>

"What," it may be asked, "does all this criticism amount to but a mere restatement of the trite saying, *Omnis definitio in jure periculosa est*? What objections are there to maxims, what dangers connected with their use, which do not apply with equal force to all legal definitions, and indeed to all attempts to state the law in any form?" We reply that if the difference is only one of degree, it does not follow that such difference is unimportant, or that it does not call for serious warning. Undoubtedly all jurists who undertake to formulate statements of law, no matter in what shape, must labor under great difficulties, arising (*inter alia*) from the combined effect of "the poverty of language" and "the subtlety of human nature." But there are especial reasons why the dangers in the use of maxims are practically much greater than the dangers when the law is stated in other modes. And of these reasons, two, at least, deserve particular mention.

<sup>1</sup> Austin on Jurisprudence, 3d ed. 1116.

<sup>4</sup> 1 Austin on Jurisprudence, 3d ed. 93.

<sup>2</sup> Maine's Ancient Law, 1st Am. ed. 327.

<sup>5</sup> 118 Edinburgh Review, 453.

<sup>3</sup> See 13 Criminal Law Magazine, 832.



First, and most important, is the difficulty alluded to at the outset, and perhaps already sufficiently dwelt upon, viz., the danger necessarily arising from brevity. While agreeing with the Law Quarterly Review, that "it is hardly fair to find fault with a maxim for its brevity," one must also agree with the further statement of the Review, that "brevity should make us beware."<sup>1</sup> Not only is the meaning of short phrases peculiarly liable to misapprehension, but there are frequent mistakes as to their scope and application. Lord Bacon said: "This delivering of knowledge in distinct and disjointed aphorisms does leave the wit of man more free to turn and toss, and to make use of that which is so delivered to more several purposes and applications."<sup>2</sup> But there is certainly the accompanying danger that "the wit of man" is very likely to turn and twist these aphorisms to purposes not intended by their framers.

Second, the fact that the great majority of legal maxims are clothed in the words of a dead language has had, in some instances, the effect of preventing proper inquiry into their meaning. A phrase couched in Latin seems to some persons invested with "a kind of mysterious halo." Of course Judge Lord was right when he said: "There is nothing of mystery or of sanctity in the words of a dead language."<sup>3</sup> But no one who reflects on the subject can doubt that some useless Latin maxims, and some untrue Latin maxims have continued current, and that other Latin maxims have been misapplied, when this would not have happened if those maxims had been expressed only in the vernacular. How else can we account for the way in which certain phrases are put forward as containing the reason for a rule, when the same phrase reduced into plain English is obviously nothing more than a restatement of the rule itself? A phrase, when put to such a use, may fairly be characterized as a "question-begging maxim." It is not an explanation; "it is merely an artificial statement of the thing to be explained;"<sup>4</sup> it is "dogma, not reasoning."

Lord Bacon tells us that he put the maxims in Latin, because he regarded that language "as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest authority and majesty to be vouched and alleged in argument."<sup>5</sup> No

<sup>1</sup> 5 Law Quarterly Review, 444.

<sup>2</sup> Preface to Bacon's Maxims of the Law.

<sup>3</sup> 125 Mass. p. 335, in reference to the words, "*ultra vires*."

<sup>4</sup> See Pollock's Essays in Jurisprudence and Ethics, 118.

<sup>5</sup> Preface to Bacon's Maxims of the Law.

doubt these advantages are entitled to consideration; but there is the obvious disadvantage that maxims "put in Latin" will be more liable to be misunderstood by the average lawyer than by a man of Bacon's scholarship. And although the maxims have now been translated by modern editors, yet they are still generally cited in their Latin garb.

It is time to bring this discussion to an end. What, then, is the conclusion of the whole matter? Shall we say that Mr. Broom's book should be burned by the common hangman; and that the citation of maxims in courts of justice should be forbidden by a legislative enactment framed upon the model of the statute passed in the early days of Kentucky, prohibiting the citation of English decisions.<sup>1</sup> Far from it. On the contrary, Mr. Broom's excellent work should be in the library of every practitioner; and all lawyers should familiarize themselves with the leading maxims, which have the great merit of being "easily learned and not easily forgotten." But it should always be remembered that these familiar phrases are not all of equal value; that some ought to be amended, and others discarded altogether. Above all, it should be remembered that these maxims (even the best of them) are only maxims; that they are "not meant to take the place of a digest;"<sup>2</sup> that they are neither definitions nor treatises;<sup>3</sup> that while they are "a convenient currency," yet "they require the test from time to time of a careful analysis;"<sup>4</sup> and that, in many instances, they are merely guide-posts pointing to the right road, but not the road itself.

*Jeremiah Smith.*

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<sup>1</sup> Schurz's *Life of Henry Clay*, 49-50; Dembitz, *Kentucky Jurisprudence*, 7, 8.

<sup>2</sup> 5 *Law Quarterly Review*, 444.

<sup>3</sup> See 13 *Criminal Law Magazine*, 832.

<sup>4</sup> 5 *Law Quarterly Review*, 444.



JUDICIAL PRECEDENTS.—A SHORT STUDY  
IN COMPARATIVE JURISPRUDENCE.

THE weight attached to precedent in every department of life is closely connected with the force of habit, and has its root deep in human nature. That judicial precedents have exercised great influence in all systems of law is more than probable; the feeling that a rule is morally right has often arisen from the fact that it has long been followed as a rule; but the degree in which judicial decisions have been openly recognized as authoritative, simply because they are judicial decisions, has varied very greatly in different systems. Judges are everywhere largely influenced by what has been done by themselves or their predecessors, but the theories to explain and control such influence have been diverse, and the development of the law has not been unaffected by them.

It may, perhaps, be of some interest to compare a few of these theories.

Two things should be borne in mind. In the first place, the functions of courts are not in practice confined to the decision of particular causes. Either by authority expressly delegated, or of their own motion, courts have undertaken to legislate with regard to the conduct of litigation before themselves; they have published general rules, in the form of command or permission, setting forth the manner in which they will proceed. The most striking example is the edict of the Roman prætor, which became a chief instrument in the development of the Roman law. Doubtless special cases gave rise to many of its provisions, but none the less it was in form a legislative, not a judicial act. The Scotch Court of Sessions, in its Acts of Sederunt, assumed extensive powers of enacting laws, and in our days governments have frequently intrusted to courts a wide authority to make rules of procedure. All this lies outside of our present limits. Such rules are not judicial precedents.

Further, the peculiar effect and quality of a judicial precedent as a source of law should be noted. So far as it expresses the opinion of wise or learned men, or so far as it expresses the opinion of the community, it may be a source of law; but its peculiar force as a judicial precedent lies, not in its accordance with philos-

ophy or common sense; not in the fact that it is right, not that it ought to have been made, but that it *has* been made. Of course the decision of a court may unite the character of a judicial precedent with the character of an expression of wise thought or of popular sentiment, but often these characters are separated. To go no farther than our own law, there is no difficulty in finding decisions standing as precedents, at which, like the Rule in Dumpor's Case, "the profession have always wondered," or which, at any rate, are no expression of contemporary opinion, and would never be made at the present day.

*Roman Law.* — Of judicial precedents as a source of law we find nothing in the time of the Republic, unless so far as the rulings of the pontifical college had this character, Dig. I. 2, 2, § 6. The manner in which the *pontifices* intervened in lawsuits between individuals is very obscure, and must remain largely matter of conjecture. I Ihering, Geist des röm. Rechts, § 18 a. At any rate, before the end of the Republic, their power of controlling litigation appears to have greatly diminished, and the practice of giving opinions had passed to the unofficial body of jurisconsults, *juris prudentes*, who seem to have enjoyed great public consideration; but the opinions of these jurisconsults, however worthy of respect, were in no way binding on the magistrates and judges. They did not form, however remotely, a judicial body.

But Augustus gave to certain persons *jus respondendi* by the authority of the Emperor. All that we know of the *jus respondendi* is contained in three passages: one an extract from the *Liber singularis enchiridii* of Pomponius, Dig. I. 2, 1, §§ 48, 49; the second, two sentences from Gaius (I. § 7), as follow: "*Responsa prudentium sunt sententiæ et opiniones eorum quibus permissum est jura condere. Quorum omnium si in unum sententiæ concurrunt, id quod ita sentiunt legis vicem optinet; si vero dissentiunt, judici licet quam velit sententiam sequi; idque rescripto Divi Hadriani significatur;*" the third, a passage in the Institutes, Inst. I. 2, §§ 8, 9, taken from the above cited words of Gaius.

There has been much discussion whether the *responsa* of those jurisconsults who had the *jus respondendi* were made binding on the courts by Augustus, or whether this quality was first given to them by Hadrian. Glasson, Étude sur Gaius, 84-119. But from our present point of view the question of most interest is not at what date the *responsa* acquired a binding character, but whether, after they had acquired that character, they were binding only in



the particular case in which they were given, or whether they were obligatory upon the courts as precedents in later cases. If the former was the fact, then the jurisconsults were simply judges of a superior order, to whom the ordinary magistrates had to submit themselves. If the latter was true, then we have real precedents, analogous to those which prevail in the common law, but more stringent in character.

The extract from Pomponius throws no light on the question; it appears to be consistent with either theory; but the passage of Gaius, taken in its connection, seems to favor the latter view. He says, § 3: "*Constat autem jus [civile] populi Romani ex legibus, plebiscitis, senatus consultis, constitutionibus principum, edictis eorum qui jus edicendi habent, responsis prudentium;*" and after describing the other enumerated sources of the law, he gives the account of the *responsa prudentium*, above cited, thus seeming to class them among the sources of the law. Further, the expressions "*jura condere*" and "*legis vicem optinet*" are more applicable to opinions which made law than to those which merely decided special cases. In like manner the Institutes of Justinian say (Inst. I. 2, § 3) "*scriptum jus est lex, plebis cita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium,*" and they also adopt from Gaius the expression "*jura condere.*" The most probable opinion seems therefore to be that the *responsa* of those *prudentes* who had the *juris respondendi* had the character of true judicial precedents.

By the time of Diocletian (A. D. 284-305) the *jus respondendi* seems to have ceased to be given, and gradually all the writings of the great jurists of the earlier years of the Empire came to be considered as authorities, without any distinction being made between their *responsa* and their treatises. It was just as if Judge Story's judgments and treatises were to be considered of like weight. The power of adding to the law or of modifying it by judicial decisions had passed away. The law, like the Empire, had reached a period of degradation and sterility. It had no vitality, and could only nourish itself indiscriminately on the past.<sup>1</sup>

1 "The writings of the jurists who had not possessed the *jus respondendi* were cited as entitled to an authority in no way inferior to that of the writings of privileged jurists, provided only that they were supported by the same literary prestige which distinguished the writings of the illustrious privileged jurists. . . . Considering that, in case of the privileged jurists, their other writings, which, of course, had nothing to do with their *jus respondendi*, were ranked on a par with the writings in the *responsa*, it was altogether absurd to insist on the *jus respondendi* as a condition of judicial authority.

So much as to the *responsa prudentium*. The judicial acts of the Emperor were *decreta* and *rescripta*. The *decreta* were decrees, final or interlocutory, in a cause. The *rescripts* were letters sent to the judges or to the parties in a suit, giving the decision which ought to be rendered. There seems to have been no substantial difference in their effect upon a suit; unquestionably they were alike obligatory upon the judges in the cases in which they were given, but the question arises, as with the *responsa prudentium*, — were they binding precedents?

That in the classical period of the Roman law *decreta* had sometimes the force of precedents, seems the more probable opinion. Gaius, we have seen, gives the *constitutiones principum* among the sources of the law, and he defines the term thus: "*Constitutio principis est, quod imperator decreto vel edicto vel epistula constituit, nec unquam dubitatum est, quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat*" (Gaius, I. § 5). So Ulpian: "*Quodcumque igitur imperator per epistulam et subscriptionem statuit, vel cognoscens decrevit vel de plano interlocutus est vel edicto præcepit, legem esse constat.*" Dig. I. 4, 1, § 1. Again Fronto, who, to be sure, was an orator and rhetorician, rather than a jurist, in an oration to Antoninus Pius, said: "*Tuis decretis, imperator, exempla publice valitura in perpetuum sanciantur . . . tu, ubi quid in singulos decernis, ibi universos exemplo adstringis: quare si hoc decretum tibi proconsulis placuerit formam dederis omnibus omnium provinciarum magistratibus, quid in ejusmodi causis decernant.*" Fronto, I. 6. See also *Decretum divi Marci*, D. IV. 2, 13; XLVIII. 7, 7.

On the other hand, Justinian says that the binding force as precedents of the imperial decrees had been doubted by some, though he adds, "*vanam scrupulositatem tam risimus quam corrigendam esse censuimus.*" He proceeded to remove any doubt in the matter, and declared, "*Si imperialis majestas causam cognitionaliter examinaverit et partibus cominus constitutis sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hoc esse legem non solum illi causæ, pro qua producta est, sed omnibus similibus . . . cum et veteris juris conditores constitutiones, quæ*

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The practice of not discriminating between the different kinds of writings necessarily led to the practice of not discriminating between the authors themselves, — which is only another way of saying that the transfer of the authority of the *responsa* to juristic literature in general had become an accomplished fact." Sohm, *Institutes* (Ledlie's Transl.) § 17. See also the "Law of Citations" (A. D. 426), Cod. Theod. I. 4.



*ex imperiali decreto processerunt, legis vicem obtinere aperte dilucideque definiunt.*" C. I. 14, 12.

The truth perhaps was, that originally decrees proceeding from the Emperor had only the effect of those pronounced by lower magistrates, and merely settled the particular controversy; that naturally and gradually they acquired the character of precedents; but that old-fashioned lawyers of a conservative turn still clung to the ancient theory; and even Justinian inserted in his Code a rescript, originally published about a century before, which says of interlocutory decrees: "*Interlocutionibus quas in uno negotio judicantes protulimus, vel postea proferemus, non in commune præjudicantibus.*" C. I. 14, 3.

Savigny thought that the imperial *decreta* were not of force as precedents. I Heut. röm. Rechts, § 23. But his view is generally disapproved by later writers. I Puchta, Inst. § 111; I Karlowa, röm. Rechtsgesch. 649 *et seq.*; Esmarch, röm. Rechtsgesch., § 135; Krüger, Gesch. der Quellen, § 14. Cf. Wlassak, Krit. Stud. zur Rechtsq. 134.

Rescripts (with their subvarieties of *adnotationes*, *subscriptiones*, *epistulæ*, *pragmaticæ sanctiones*) were answers to requests for instructions from the judge or parties to a suit. *Rescripta generalia* were of force as precedents. It is not clear what made a rescript *generale*.<sup>1</sup>

But cases were often not fully or fairly presented to the Emperor, and this brought rescripts themselves into disfavor. Trajan is said to have never sent rescripts "*ne ad alias causas facta præferrentur quæ ad gratiam composita viderentur.*" Capitolinus, Vita Macrini, c. 13. In A. D. 398 it was ordered that rescripts should not be regarded as precedents. Theo. Cod. I. 2, 11. This was again declared in A. D. 426, and was finally taken up by Justinian into his Code, C. I. 14, 2. Justinian also declared that no decisions of any magistrates should have the force of precedents. C. VII. 45, 13. The law after Justinian's legislation, therefore, gave the force of binding precedents to the Emperor's decrees, but denied it to the decrees of all other magistrates, as well as to rescripts issuing from any source. Sav. I Heut. röm. R., § 24, note (r.).

The idea of precedent was therefore familiar to the Roman law, but its scope was limited.<sup>2</sup>

<sup>1</sup> The passage which throws most light on this question is Dig. XXII. 6, 9, §§ 5, 6.

<sup>2</sup> See also C. I. 19, 7; C. I. 22, 6; Nov. 113, c. 1; and cf. Dig. I. 3, 34; Dig. I. 3, 38.

In Justinian's law books the opinions of jurisconsults and the decisions of judges in particular cases, having been jumbled together and taken up bodily into the Digest, were enacted as a statute, but in interpreting them they could not be dealt with like statute provisions in the ordinary form; the reasoning applied to them was often like that suitable to the discussion of judicial decisions, and it would have been well if it had been so to a larger extent.

*German Law.* — In Germany during the Middle Ages the courts were composed of a judge (Richter) and Schöffen. The Richter presided, kept order and gave judgement, but on a doubtful point of law he took the opinion of the Schöffen; and often the Schöffen sought the opinion of the Schöffen of another city or town, either because of their reputation as depositaries of the law, or because of its standing in the relation of mother city to that from which the request came.

The opinions of the Schöffen were generally called Weisthumer. There is a great collection of them by Grimm, the publication of which covered the interval between 1840 and 1878. They took a variety of forms; sometimes they were put as general rules, sometimes as answers to hypothetical cases, and sometimes as opinions in particular real cases. These last availed, it would seem, not only in the cases in which they were delivered, but also as binding in future cases in the same court, and as having a weight beyond their intrinsic merits in other courts. 1 Stobbe, Handb. deutsch. Privatrechts, § 24; Gaupp, Das alte magdeburg. Recht, 90-94.<sup>1</sup>

The introduction of the Roman law into Germany and its driving out of the ancient law were due mainly to doctors of civil law acquiring judicial position. This seems to be the conclusion reached by all the late writers. But the modern German civilians

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<sup>1</sup> Widerkind, as cited in 1 Stobbe, Geschichte, § 27, p. 275, gives a curious instance in which a general doctrine was perhaps established by a judgment in a particular case, not however by the opinion of Schöffen. There was a question whether the children of a deceased son could share with the son's brothers in the inheritance from the father. The King "*rem inter gladiatores discerni jussit. Vicit igitur pars, qui filios filiorum computabant inter filios, et firmatum est ut aequaliter cum patruis hereditatem dividerent pacto sempiterno.*"

So in the Imperial Court in 1235, the Emperor Frederick II. established a standing judge and decided: "*Idem scribet omnes sententias coram nobis in majoribus causis inventas, maxime contradictorio judicio obtentas, quæ vulgo dicuntur 'gesamint urteil,' ut in posterum in casibus similibus ambiguitas rescindatur, expressa terra secundum consuetudinem cujus sententiatum est.*" 1 Stobbe, 466, 467.



have rather ungratefully kicked down the ladder by which they themselves have climbed, and exhibit a great repugnance to recognize judicial decisions or *Gerichtsgebrauch* in any form as a source of law. Perhaps the dislike felt towards the old Schöffengerichte courts may have had something to do with this attitude.

The prevalent view on the subject among modern civilians is expressed in an elaborate and much cited article by Jordan, 8 Archiv. für civil. Prax. 191, 245 *et seq.* He sums it up thus: "Judicial usage (*Gerichtsgebrauch*) as such, that is by reason of its being judicial usage, has formally no binding force, and materially only so much value as on the principles of a sound jurisprudence belongs to it by reason of its inner nature; and hence a court cannot be bound to follow its own usage or the usage of another court as a rule of decision, but rather has the duty to test every question with its own jurisprudence, and ought to apply usage only when it can find no better rule of decision."

Later writers seem generally to deny that *Gerichtsgebrauch* is a source of law at all, and consider judicial decisions as merely evidence (just as many other things might be evidence) of customary law. This seems to have been Savigny's opinion. See 1 Heut. röm. Rechts, § 29; and such are the views, for instance, of Wächter, 23 Archiv. f. civ. Prax. 432, and of Keller in his Pandekten, § 3.

Thus Stobbe (1 Handb. d. deutsch. Privatrechts, § 24, p. 165): "Practice is in itself not a source of law; a court can depart from its former practice, and no court is bound to the practice of another. Departure from the practice hitherto observed is not only permitted but required, if there are better reasons for another treatment of the question at law."

Dernburg in his Pandekten is the only recent author whom I have observed fairly to admit that *Gerichtsgebrauch* is a source of law; and even he says: "Single decisions of a court, even of the highest, do not make *Gerichtsgebrauch*," which he defines as "the general uniform and long continued existence of a legal tenet by the court of the country." Pand. § 29.

One point especially of the German theory seems very strange to a common-law lawyer. To such the duty of a lower court to follow the precedents set it by the court of appeal seems one of the plainest of judicial obligations, but the German writers, almost to a man, unite in denying this duty. Gengler, § 13, is the only writer cited by Stobbe (1 Handb. § 24, p. 165) who affirms it.

Jordan (and one specimen will do for all) says: "The lower courts act in accordance with the will of the Legislature, if they follow the clear usage of the higher courts, although they are not bound to do so absolutely, but are only held to such following so far as they find it grounded in the will of the Legislature according to their own examination, from which they are never excused." *Archiv. f. civ. Prax.* 246, 247.

Savigny, § 20, with a vagueness not common to him, says that when the lower courts conform to the jurisprudence of the higher "they do not yield to authority, but enter into the spirit of the legislator, whose wisdom has established the different degrees of jurisdiction."<sup>1</sup>

*Scotch Law.*—The position assigned to judicial precedents in Scotland seems to be intermediate between that occupied by them on the continent of Europe and that to which they are raised in England.

Erskine in his *Institutes*, Book I. tit. I, § 47 (1768), says: "An uniform series of decisions of the Court of Session, *i. e.*, of their judgments on particular points, either of right or of form, brought before them by litigants, and anciently called Practices, is by Mackenzie accounted part of our customary law. Thus far may be admitted. First, that their more ancient decisions, from which it appears that any particular usage had then acquired the force of law, may be properly brought in proof of that custom, if it have not afterwards lost its authority by an immemorial and universal usage to the contrary; and secondly, that great weight is to be laid on their later decisions, where they continue for a reasonable time uniform, upon points that appear doubtful. L. 38, *de legib.* But they have no proper authority in similar cases, because the tacit consent on which unwritten law is founded cannot be inferred from the judicial proceedings of any court of law, however distinguished by dignity or character; and judgments ought not to be pronounced by examples or precedents. L. 13, C. *de sent. et int.* Decisions, therefore, though they bind the parties litigating, create no obligation on the judges to follow in the same tract, if it shall appear to them contrary to law. It is, however, certain that they are frequently the occasion of establishing usages, which, after they have gathered force by a sufficient length of time, must,

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<sup>1</sup> In France it would seem, as in Germany, judicial decisions are not binding precedents, even in inferior courts.



from the tacit consent of the State, make part of our unwritten law. What has been said of decisions of the Court of Session is also applicable to the judgments pronounced upon appeal, by the House of Lords: for in these that august court acts in the character of judges, not of law-givers; and consequently their judgments, though they are final as to the parties in the appeal, cannot introduce any general rules which shall be binding either on themselves or inferior courts. Nevertheless, where a similar judgment is repeated in this court of the last resort, it ought to have the strongest influence on the determinations of inferior courts.”<sup>1</sup>

In his Principles, Book I. tit. 1, § 17, Erskine uses substantially the language of his Institutes. In the eighteenth edition by Mr. Rankine (1890) the following is added: “There is a scale of authority from the House of Lords down to the humblest tribunal; and a reported ground of judgment—not being a mere *obiter dictum*—expressed in one case by a superior court, is binding in a similar case in an inferior court, unless and until it is itself reversed or displaced by statute.”<sup>2</sup>

The example of the English courts, and indeed the whole tone of the law in England, may have had an influence in elevating the importance of judicial precedents in Scotland above the condition which they fill on the Continent; and also the power given to the Court of Session actually to legislate by means of Acts of Sederunt may have aided to give weight to their judgment in litigated cases.

On the other hand, the fact that the court of ultimate appeal, the House of Lords, was a tribunal composed entirely of English judges (for I believe no one was ever called from the Scotch bench or bar to the House of Lords until the Appellate Jurisdiction Act of 1876), and the irritation which prevailed in Scotland at this state of affairs, had very likely considerable effect in maintaining in that country the doctrine that precedents do not make law.

*Common Law.*—In England, and in those countries where the English law prevails, a different theory now exists. While in Germany, jurists insist that a decision by a court has, aside from its intrinsic merit, no binding force on a judge, even on a judge from whom an appeal lies to the court rendering the decision, it

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<sup>1</sup> See also the language of the earlier writers, Mackenzie, *Inst.* Book I. tit. 1, § 10 (1716); Bankton, *1 Inst.* Book I. tit. 1, § 74 (1751).

<sup>2</sup> See also 4 *Leg. Obs.* 289; 24 *Journal of Jurisp.* 140.

is law in England and in the United States that, apart from its intrinsic merits, the decision of a court has great weight as a precedent with that court and all co-ordinate courts in the same jurisdiction, and is absolutely binding on all inferior courts.

The reason of this distinction is one of the many unsolved problems of comparative jurisprudence. And in the common law itself this regard for judicial precedents is a characteristic of its later, and not of its earlier stages.

Glanville, who was probably the real author of the "*Tractatus de Legibus*," which goes by his name, died in 1190. There seems to be but one reference in his book to a decision of a court. Book VII. c. 1.

Bracton, whose Treatise, "*De Legibus et Consuetudinibus Angliæ*," was written in the middle of the thirteenth century, forms a singular exception to the general rule. He abounds in references to cases. But Mr. Maitland, in his remarkable book, has shown that, with trifling exceptions, the cases cited by Bracton were all decided at courts in which Martin Pateshull and William Raleigh sat as judges. "His is a treatise on English law as administered by Pateshull and Raleigh."<sup>1</sup>

Bracton was exceptional. Fleta, written towards the end of the thirteenth century, was largely drawn from Bracton, but in only one chapter does he refer to particular decisions. In this chapter (Lib. 2, c. 3) he gives three cases as to the jurisdiction of the Steward of the King's Court when the King was out of England, two of them being in Gascony and one in Paris, the last being a decision of the French King's Council that the King of England had jurisdiction over one Ingelramus caught in the English King's hotel with stolen goods. Ingelramus was tried before the Steward and was "*suspensus in patibulo Sancti Germani de Pratis*."

Britton, who also wrote about the close of the thirteenth century, took in like manner largely from Bracton, but I have found no reference whatever in his book to any decision of the courts.

So in the first Year Book yet printed, and which is later than Bracton and nearly contemporaneous with Fleta and Britton, 20 & 21 Edw. I. (1292-1293), the references to decisions are few and brief, *e. g.*, "Witness the case of William de la Bathe" (p. 211): "Note that he who will allege payment must have either a writing or a tally. In the time of Thomas de Weylond a tally was not allowed; now it is" (p. 305). See also pp. 195, 415, 439.

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<sup>1</sup> Maitland, Bracton's Note Book, 40, 45, 48 *et seqq.*, 60.



Nor does the citation of cases increase. Fifty years later, 14 Edw. III. (1340), the reports of which fill about two volumes in Mr. Pike's new edition of the Year Books, there are only three cases cited by name either by the bench or at the bar. 14 Edw. III. 37, 63, 247, 253. The other references are all to cases by their Term or other description, *e.g.*, "*Contra Michaelis nono*," and all but one (p. 285) appear to be notes by the reporter or other owner of the book.<sup>1</sup>

Coming down to the end of the century (1400), 2 Hen. IV., we find the Year Book of that year containing reports of 131 cases filling 25 folios. There are three instances in which judges refer to particular decisions, 7 pl. 26; 10 pl. 45; 23 pl. 9. In another case counsel said that a married woman ought not to be allowed to plead in an action of waste after default by her husband, *quod contra dicebatur per totam Curiam eo quod sæpius en tiel case el ad este receive*, 2 pl. 7; again the practice of the King's Bench in replevin is declared to be different from that which prevails elsewhere, 9 pl. 44; in three other cases earlier decisions are referred to, but only not to be followed, 6 pl. 21; 15 pl. 16; 19 pl. 12; and in 21 pl. 20 the reporter notes that the decision made was not afterwards followed.

Let us take a time forty years later (1440), 18 Hen. VI. The reports for this year cover 34 folios. Lovell's Case is referred to twice by name, 8 pl. 7; 9 pl. 7. Besides, in four instances it is said, "*ceo ad este adjuge*," 6 pl. 6; 10 pl. 9; 15 pl. 3, *bis*.<sup>2</sup>

The two legal treatises of the fifteenth century make but little reference to judicial decisions as authority. In Fortescue's book, *De Laudibus Legum Angliæ*, there is no reference to any decided case, and in the seven hundred and forty-nine sections of Littleton's Tenures, only eleven cases are referred to, usually in the briefest manner, §§ 88 (and 94), 96, 157, 383, 412, 420, 514, 643 (and 644), 692, 702, 729.

<sup>1</sup> In Hengham Magna and Hengham Parva, the work of a Chief Justice in Edward I.'s time, a case before Henricus de Bathonia is given at length. Heng. Mag. c. 10 *ad fin.*; the opinion of the same judge is referred to in three other places of the same book, once in c. 8, and twice in c. 9; another case is referred to in c. 13; and there is one reference in Hengham Parva, c. 3.

<sup>2</sup> Lord Coke in the preface to the tenth volume of his Reports, speaking of his own time, says: "The ancient order of arguments by our serjeants and apprentices of law at the bar is altogether altered. 1. They never cited any book, case, or authority in particular, 'as is holden in 40 E. III.,' &c., but '*est tenus ou agree in n're livres*,' '*est tenus adjuge in termes*,' or such like, which order yet remains in moots at the bar in the Inner Temple to this day."

Our last examination of the Year Books was in 1440; let us come down fifty years later, to 1490, 5 Hen. VII. In the Year Book for that year we find fifty-three cases, filling forty-one folios. Excluding reporters' notes, there are probably nine places where either court or counsel use "*ceo est adjuge*" or other like expression, — five times with a reference to the year (17 pl. 9; 23 pl. 4, *bis*; 25 pl. 7; 28 pl. 9) and four times without (4 pl. 9; 8 pl. 17; 15 pl. 14; 38 pl. 3). In three other places cases are referred to without name, but somewhat more at length (12 pl. 4; 16 pl. 9; 28 pl. 9); and in 19 pl. 1, the case of Boham *v.* Bishop of Lincoln, 33 Hen. VI. 12; 34 Hen. VI. 38, was relied on by counsel, but repudiated by Bryan, C. J., who said the law would not be held as it was there.

The last year which appears in the Year Books is 27 Hen. VIII. 1535, and of it only three terms are reported. Judicial decisions are more frequently cited; still the references are not numerous.

Descending a generation, we come across one of the most famous and accurate of reporters, and the one perhaps who reported what passed in court at the greatest length, Edmund Plowden. The first ten cases in his second volume, not including the pleadings, fill over fifty folios or one hundred pages, and an examination of them yields the following result: Cases cited and stated as authority, seventeen; legal propositions cited from cases, five; cases cited but disallowed, two; in all, twenty-four cases referred to.

It is fair to remark, however, that in other reporters of the same period a somewhat larger number of references to decisions will be found, and that Plowden himself in one place speaks of his having omitted "many good cases" referred to by the judges.

The practice of citation blossomed out in Lord Coke. Opening in the middle of his reports, we find in the first twenty-five folios of the seventh volume, two hundred and twenty-eight (228) references to cases, — an average twenty times greater than that of Plowden.

Although later judges and writers have not been so prolific as Lord Coke, yet the importance attached to precedents has diminished but little since his time, and, as said above, the rule of the common law is that, aside from their intrinsic merits as the expression of the opinion of able and learned persons, the actual decisions of a court are of great weight with that court and all co-ordinate courts, and are absolutely binding upon all inferior courts.



It seems impossible to give the force of judicial precedents in the common law more exactly; they have great weight, but not irresistible weight. Their decisions can be (and I mean can be according to the theory of the common law) overruled or not followed. Any attempt at more precise determination would result simply in a theory by the particular writer as to what would be desirable rules, and not of what are in fact the principles which govern.<sup>1</sup>

The circumstance that in the English law precedents are to be generally but not always followed, and that no rules have been, or apparently can be, laid down to determine the matter precisely, shows how largely the English law is the creation of judges, for they not only make the precedents, but say when the precedents shall be followed or departed from.

The House of Lords, however, according to modern theory, is absolutely bound to follow its own precedents.<sup>2</sup> This notion is not an ancient one. In 1760 the House in *Pelham v. Gregory*, 3 Bro. P. C. (Toml. ed.) 204, overruled its decision made in 1736, in *Brett v. Sawbridge*, Id. 141, on a question of remoteness. But in 1827, in *Fletcher v. Soudes*, 1 Bligh, N. S. 144, 249, Lord Eton declared that the House was bound by *Bishop of London v. Ffytche*, 2 Bro. P. C. (Toml. ed.) 211, which was the last case where peers, not learned in the law, voted, and in which the courts of Common Pleas and King's Bench were overruled by a vote of nineteen to eighteen.

But in 1821, in the case of *Perry v. Whitehead*, 6 Ves. 544, 548, Lord Eldon said that "a rule of law laid down by the House of Lords must remain till altered by the House of Lords." As late as 1852 Lord St. Leonards expressed an opinion that the House was not bound by any rule of law which they might lay down, *Bright v. Hutton*, 3 H. L. C. 341; and in 1860, in *A. G. v. Dean and Canons of Winsor*, 8 H. L. C. 369, 459, Lord Kingsdown reserved his opinion upon the question; but during this time Lord Campbell was reiterating that the House could not change the rules of law it had laid down. 3 H. L. C. 391; 8 H. L. C. 391, 392;

<sup>1</sup> The best statement of the circumstances which add to or diminish the weight of precedents is to be found in *Ram on Judgments*.

<sup>2</sup> No such doctrine governs the Judicial Committee of the Privy Council, which is for colonial and certain other matters an ultimate court of appeal. Thus the decision that a colonial legislature had a common-law power to punish contempt, which was made in *Beaumont v. Barrett*, 1 Moore, P. C. 59 (1836), was overruled by *Keilley v. Carson*, 4 Moore, P. C. 63 (1842), the same judge, Baron Parke, delivering the opinion in both cases.

9 H. L. C. 338, 339. Lord Campbell's view seems to have prevailed. See *Mersey Docks Trustees v. Gibbs*, L. R. 1 H. L. 125, per Lord Wensleydale; *Hadfield's Case*, L. R. 8 C. P. 313.

The most striking difference in the Common and Civil Law, at least as the latter is administered on the Continent, is that under the Civil Law a judge is at liberty to disregard the decision of a higher court. In the Common Law this is never done unless the higher court has committed a palpable error, as for example in *Drummond v. Drummond*, L. R. 2 Eq. 335, where Lord Westbury had decided a case in ignorance of a statute. The only other case I recall in England is *Hensman v. Fryer*, L. R. 3 Ch. 420, where the ruling of Lord Chelmsford, C., that specific devises and pecuniary legacies should abate *pro rata*, has been repudiated by all the Vice Chancellors before whom the question has since come. *Collins v. Lewis*, L. R. 8 Eq. 708; *Dugdale v. Dugdale*, L. R. 14 Eq. 234; *Tomkins v. Colthurst*, 1 Ch. D. 626; *Farquharson v. Floyer*, 3 Ch. D. 109. This was not the case of forgetting a statute, but of a sheer blunder. All the recent writers agree that this was so.

In the United States the general rule and practice as to the weight due to a precedent in the court which made it or in a court of co-ordinate jurisdiction is substantially the same as in England. Naturally, considering the character of the people and of institutions, the weight attached to judicial precedent is somewhat less than in England, but the difference will hardly admit of any precise definition, and it does not seem worth while to attempt it.

The House of Lords will not overrule its own decisions. No such doctrine prevails in America; the highest courts of the respective States, as well as the Supreme Court of the United States, all consider that they have the power to depart from their former rulings, however inexpedient it may be to exercise it. The Supreme Court of the United States has overruled its previous decisions in questions of the gravest moment. Thus in 1825 that court decided that the Admiralty Jurisdiction did not extend on the great rivers above the ebb and flow of the tide, and reaffirmed the doctrine in 1837. But in 1851 it overruled those cases, and held that the Admiralty extended over the great rivers wherever actually navigable. Again in the *Legal Tender Cases* that court in 1871 changed the ruling which it had made in 1870. Great feeling prevailed in some quarters as to the supposed mode in which this change had been brought about; but the power of the court was not questioned.



The same rule as to the duty of a lower court to follow a precedent established by a higher court prevails in America as it does in England.

It has been said in the United States that a judgment made by an equally divided court, though conclusive in the particular case, should have no weight attached to it as a precedent. See *Bridge v. Johnson*, 5 Wend. 342, 372; *People v. Mayor of New York*, 25 Wend. 252, 256; *Etting v. Bank of United States*, 11 Wheat. 59, 78.

There are several questions within the domain of the Common Law on the effect of precedents. For instance: What is the degree of authority, in the courts of one jurisdiction, of the decisions in courts of other jurisdictions, as compared, on the one hand, with the decisions of the former courts themselves, and on the other hand with *dicta* of judges, or the writings of non-judicial persons? My learned colleague, Professor Wambaugh, has some valuable suggestions on this in the ninth chapter of his treatise on the Study of Cases. Again: What is the weight attributed in the United States to the decisions of the English courts made (1) before the planting of the Colonies; (2) between the planting of the Colonies and the American Revolution; (3) since the Revolution? So again: What authority in the Federal courts of the United States is attributed to the decisions of the courts of a State as determining the law of that State? Or, finally: Are judicial decisions to be considered as making new law, or as simply declaring law previously existing? But to discuss these here would exceed all reasonable limits.

*John Chipman Gray.*

## EXECUTORS.

AT the present day executors and administrators hold the assets of the estate in a fiduciary capacity. Their rights and liabilities in respect of the fund in their hands, are very like those of trustees. But this way of regarding them is somewhat modern. I wish to call attention to several changes in the law which have taken place at different times and without reference to each other, for the purpose of suggesting that they are witnesses of an older condition of things in which the executor received his testator's assets in his own right. As usually is the case with regard to a collection of doctrines of which one seeks to show that they point to a more general but forgotten principle, there can be found a plausible separate explanation for each or for most of them, which some, no doubt, will regard as the last word to be said upon the matter.

I have shown elsewhere that originally the only person liable to be sued for the debts of the deceased, if they were disputed and had not passed to judgment in the debtor's lifetime, was the heir.<sup>1</sup> In Glanville's time, if the effects of the ancestor were not sufficient for the payment of his debts the heir was bound to make up the deficiency out of his own property.<sup>2</sup> In the case of debts to the king, this liability continued as late as Edward III,<sup>3</sup> royalty like religion being a conservator of archaisms. The unlimited liability was not peculiar to England.<sup>4</sup> While it continued we may conjecture with some confidence that a judgment against the heir was not confined to the property which came to him from his ancestor, and that such property belonged to him outright. At a later date, M. Viollet tells us, the French customary law borrowed the benefit of inventory from the Roman law of Justinian. The same process

<sup>1</sup> Early English Equity, 1 *Law Quart. Rev.* 165. The common Law, 348. Bracton 407 *b*, 61, 98 *a*, 101 *a*, 113 *b*. The article referred to in the *Law Quarterly Review* shows the origin and early functions of the executor. It is not necessary to go into them here.

<sup>2</sup> "Si vero non sufficiunt res defuncti ad debita persolvenda, tunc quidem hæres ejus defectum ipsum de suo tenetur adimplere: ita dico si habuerit ætatem hæres ipse." Glanville, *Lib. 7, c. 8. Regiam Majestatem*, Book 2, c. 39, § 3.

<sup>3</sup> 2 *Rot. Parl.* 240, pl. 35. St. 3 Ed. I., c. 19.

<sup>4</sup> Ass. *Jerus.*, Bourgeois, ch. cxci. 2 Beugnot, 130. Paul Viollet, *Hist. du Droit Franç.* 2d ed. 829.



had taken place in England before Bracton wrote. But in the earliest sources it looks as if the limitation of liability was worked out by a limitation of the amount of the judgment, not by confining the judgment to a particular fund.<sup>1</sup>

As was shown in the article above referred to, the executor took the place of the heir as universal successor within the limits which still are familiar, shortly after Bracton wrote. His right to sue and the right of others to sue him in debt seemed to have been worked out at common law.<sup>2</sup> It hardly needs argument to prove that the new rights and burdens were arrived at by treating the executor as standing in the place of the heir. The analogy relied on is apparent on the face of the authorities, and in books of a later but still early date we find the express statement, *executores universales loco hæredis sunt*,<sup>3</sup> or as it is put in Doctor and Student, "the heir, which in the laws England is called an Executor."

Now when executors thus had displaced heirs partially in the courts, the question is what was their position with regard to the property in their hands. Presumably it was like that of heirs at about the beginning of the fourteenth century, but I have had to leave that somewhat conjectural. The first mode of getting at an answer is to find out, if we can, what was the form of judgment against them. For if the judgment ran against them personally, and was not limited to the goods of the deceased in their hands, it is a more than probable corollary that they held those assets in their own right. The best evidence known to me is a case of the year 1292, (21 Ed. I.) in the Rolls of Parliament.<sup>4</sup> Margery

<sup>1</sup> Viollet, op. cit. The Common Law, 347, 348. "Hæres autem defuncti tenebitur ad debita prædecessoris sui acquietanda eatenus quatenus ad ipsum pervenerit, sci. de hæreditate defuncti, et non ultra," &c. Bracton, 61 a.

"Notandum tamen est, quod nullus de antecessoris debito tenetur respondere ultra valorem huius, quod de eius hereditate dignoscitur possidere." Somma, Lib. 2, c. 22, § 5, in 7 Ludewig, Reliq. Manuscript. 308, 309. Grand Coustum. c. 88. Compare also St. Westm. II. (13 Ed. I.) c. 19, as to the liability of the ordinary: "Obligetur decetero Ordinarius ad respondendum de debitis, quatenus bona defuncti sufficiunt, eodem modo quo executores huiusmodi respondere tenerentur si testamentum fecisset." See the cases stated below. I know of no early precedents or forms of judgments against heirs. I wish that Mr. Maitland would give the world the benefit of his knowledge and command of the sources on the matter. Later the judgment against heirs was limited to assets descended. Townesend, Second Book of Judgments, 67, pl. 26.

<sup>2</sup> Y. B. 20 & 21 Ed. I. 374, 30 Ed. I. 238. 11 Ed. III. 142. Id. 186. (Rolls ed.)

<sup>3</sup> Lyndwood, Provinciale. Lib. 3, Tit. 13, c. 5. (*Statutum bonæ memoria*), note at word, *Intestat*. Dr. & Stud. Dial. 1, c. 19.

<sup>4</sup> 1 Rot. Parl. 107, 108. It may be remarked, by the way, that an excellent example of trustee process will be found in this case.

Moygne recovered two judgments against Roger Bertelmeu as executor of William the goldsmith. In the first case he admitted the debt and set up matter in discharge. This was found against him except as to £60, as to which the finding was in his favor, and the judgment went against him personally for the residue. In the second case the claim was for 200 marks, of which the plaintiff's husband had endowed her *ad ostium ecclesie*. The defendant pleaded that the testator did not leave assets sufficient to satisfy his creditors. The plaintiff replied that her claim was preferred, which the defendant denied. The custom of boroughs was reported by four burgesses to be as the plaintiff alleged, and the plaintiff had a judgment against the defendant generally. The defendant complained of these judgments in Parliament, and assigned as error that there came to his hands only £27 at most, and that the two judgments amounted to £40 and more. The matter was compromised at this stage, but enough appears for my purposes. If the defendant was right in his contention, it would follow in our time that the judgment should be *de bonis testatoris*, yet it does not seem to have occurred to him to make that suggestion. He assumed, as the court below assumed, that the judgment was to go against him personally. The limitation for which he contended was in the amount of the judgment, not in the fund against which it should be directed.

There is some other evidence that at this time, and later, the judgment ran against the executor personally, and that the only limitation of liability expressed by it was in the amount. In the first case known to me in which executors were defeated on a plea of *plene administravit* it was decided that the plaintiff should recover of the defendants "without having regard to whether they had to the value of the demand."<sup>1</sup> Afterwards it was settled that in such cases the judgment for the debt should be of the goods of the deceased, and that the judgment for the damages should be general.<sup>2</sup> But whether the first case was right in its day or not, the material point is the way in which the question is stated. The alternatives are not a judgment *de bonis testatoris* and a general judgment against the defendants, but a judgment against the defendants limited to the amount in their hands, and an unlimited judgment against them.

<sup>1</sup> Y. B. 17 Ed. III. 66, pl. 83.

<sup>2</sup> Y. B. 11 Hen. IV. 5, pl. 11. Skrene in 7 Hen. IV. 12, 13, pl. 8. Martin in 9 Hen. VI. 44, pl. 26. Danby in 11 Hen. VI. 7, 8, pl. 12. Dyer, 32 a, pl. 2. 1 Roll. Abr. 931, D. pl. 3. 1 Wms. Saund. 336, n. 10.



But if it be assumed that a trace of absolute ownership still was shown in the form of the judgment, when we come to the execution we find a distinction between the goods of the testator and those of the executor already established. In 12 Edward III. a judgment had been recovered against a parson, who had died. His executors were summoned, and did not appear. Thereupon the plaintiff had *fieri facias* to levy on the chattels of the deceased in the executors' hands (*de lever ses chateaux qil avoient entre mayns des biens lu mort*), and on the sheriff returning that he had taken 20s. and that there were no more, execution was granted of the goods of the deceased which the executors had in their hands on the day of their summons, or to the value out of the executors' own goods if the former had been eloiigned.<sup>1</sup>

I now pass to two other rules of law for each of which there is a plausible and accepted explanation, but which I connect with each other and with my theme. In former days, I was surprised to read in Williams on Executors, that the property in the ready money left by the testator "must of necessity be altered; for when it is intermixed with the executor's own money, it is incapable of being distinguished from it, although he shall be accountable for its value."<sup>2</sup> What right, one asked oneself, has an executor to deal in that way with trust funds? In this Commonwealth at least the executor would be guilty of a breach of duty if he mingled money of his testator with his own. Another passage in Williams shows that we must not press his meaning too far. It is stated that money of the testator which can be distinguished does not pass to a bankrupt executor's assignee.<sup>3</sup> The principal passage merely was repeated from the earlier text-books of Wentworth and Toller. In Wentworth the notion appears to be stated as a consequence of the difficulty of distinguishing pieces of money of the same denomination from each other,—a most impotent reason.<sup>4</sup> There is no doubt that similar arguments were used in other cases of a later date than Wentworth.<sup>5</sup> But I prefer to regard the rule

<sup>1</sup> Y. B. 13 Ed. III. 398-401 (A. D. 1338), acc. 2 Rot. Parl. 397, No. 110 (Ed. III.). See also the intimation of Wychingham, J., in 40 Ed. III. 15, pl. 1. Fleta, Lib. 2, c. 57, § 6.

<sup>2</sup> 1 Wms. Exors. (7th ed.) 646. In the ninth edition this is qualified slightly by the editor in a note. (9th ed.) 566, 567 and n. (p).

<sup>3</sup> 1 Wms. Exors. 9th ed. 559. *Howard v. Jemmett*, 2 Burr. 1368, 1369, note; *Farr v. Newman*, 4 T. R. 621, 648.

<sup>4</sup> Wentworth, Executors (14th ed. Philadelphia, 1832), 198.

<sup>5</sup> *Whitecomb v. Jacob*, 1 Salk. 160; *Ford v. Hopkins*, 1 Salk. 283, 284; *Ryall v.*

as a survival, especially when I connect it with that next to be mentioned.

As late as Lord Ellenborough's time it was the unquestioned doctrine of the common law that the executor was answerable absolutely for goods which had come into his possession, and that he was not excused if he lost them without fault, for instance, by robbery.<sup>1</sup> Now it is possible to regard this as merely one offshoot of the early liability of bailees which still lingered alive, although the main root had rotted and had been cut a century before by Chief Justice Pemberton, and by the mock learning of Lord Holt.<sup>2</sup> It is explained in that way by Wentworth,<sup>3</sup> who wrote before the early law of bailment had been changed, but with some suggestions of difference and mitigation. If this explanation were adopted we only should throw the discussion a little further back, upon the vexed question whether possession was title in primitive law. But it is undeniable that down to the beginning of this century the greatest common-law judges held to the notion that the executor's liability stood on stronger grounds than that of an ordinary bailee, and this notion is easiest explained as an echo of a time when he was owner of the goods, and therefore absolutely accountable for their value. In the Chancery, the forum of trusts, it is not surprising to find a milder rule laid down at an earlier date, and no doubt the doctrine of equity now has supplanted that of the common law.<sup>4</sup>

There is no dispute, of course, that in some sense executors and administrators have the property in the goods of the deceased.<sup>5</sup> I take it as evidence how hard the early way of thinking died that as late as 1792, the King's Bench were divided on the question whether a sheriff could apply the goods of a testator in the hands of his executor in execution of a judgment against the executor in his own right, if the sheriff was notified after seizure that the goods were effects of the testator. As might have been expected the

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Rolle, 1 Atk. 165, 172; *Scott v. Surman*, Willes, 400, 403, 404. Rightly condemned *quoad hoc* in *Re Hallett's Estate*, 13 Ch. D. 696, 714, 715. See also *Miller v. Race*, 1 Burr. 452, 457, S. C. 1 Sm. L. C.

<sup>1</sup> *Crosse v. Smith*, 7 East, 246, 258.

<sup>2</sup> *King v. Viscount Hertford*, 2 Shower, 172; *Coggs v. Bernard*, 2 Ld. Raym. 909. *The Common Law*, Lect. 5, esp. p. 195. *Morley v. Morley*, 2 Cas. in Ch. 2.

<sup>3</sup> *Executors* (14th ed.), 234.

<sup>4</sup> Lord Hardwicke in *Jones v. Lewis*, 2 Ves. Sen. 240, 241 (1751); *Job v. Job*, 6 Ch. D. 562; *Stevens v. Gage*, 55 N. H. 175. See *Morley v. Morley*, 2 Cas. in Ch. 2 (1678).

<sup>5</sup> *Com. Dig. Administration* (B. 10). Cf., *Wms. Exors.* (9th ed.) 558.



judgment was that the sheriff had not the right, but Mr. Justice Buller delivered a powerful dissent.<sup>1</sup> A little earlier the same court decided that a sale of the testator's goods in execution of such a judgment passed the title, and Lord Mansfield laid it down as clear that an executor might alien such goods to one who knew them to be assets for the payment of debts, and that he might alien them for a debt of his own. He added, "If the debts had been paid the goods are the property of the executor."<sup>2</sup>

Another singular thing is the form of an executor's right of retainer. "If an executor has as much goods in his hands as his own debt amounts to, the property of those goods is altered and rests in himself; that is, he has them as his own proper goods in satisfaction of his debt, and not as executor."<sup>3</sup> This proposition is qualified by Wentworth, so far as to require an election where the goods are more than the debt.<sup>4</sup> But the right is clear, and if not exercised by the executor in his lifetime passes to his executor.<sup>5</sup> So when an executor or administrator pays a debt of the deceased with his own money he may appropriate chattels to the value of the debt.<sup>6</sup> A right to take money would not have seemed strange, but this right to take chattels at a valuation *in pais* without judgment is singular. It may be a survival of archaic modes of satisfaction when money was scarce and valuations in the country common.<sup>7</sup> But it may be a relic of a more extensive title.

The last fact to be considered is the late date at which equity fully carried out the notion that executors hold the assets in trust. In 1750, in a case where one Richard Watkins had died, leaving his property to his nephew and nieces, Lord Hardwicke, speaking of a subsequently deceased nephew, William Watkins, said that he "had no right to any specific part of the personal estate of Richard whatever; only a right to have that personal estate accounted for, and debts and legacies paid out of it, and so much as should

<sup>1</sup> *Farr v. Newman*, 4 T. R. 621.

<sup>2</sup> *Whale v. Booth*, 4 Doug. 36, 46. See 1 Wms. Exors. (9th ed.) 561, note.

<sup>3</sup> *Woodward v. Lord Darcy*, Plowden, 184, 185.

<sup>4</sup> *Executors* (14th ed.), 77, 198, 199.

<sup>5</sup> *Hopton v. Dryden*, Prec. Ch. 179. Wentw. Exors. (14th ed.) 77, note, citing 11 Vin. Abr. 261, 263; *Croft v. Pyke*, 3 P. Wms. 179, 183; *Burdet v. Pix*, 2 Brownl. 50.

<sup>6</sup> *Dyer*, 2a. *Elliott v. Kemp*, 7 M. & W. 306, 313.

<sup>7</sup> See, *e. g.*, the application of the trustee's wool to the judgment in 1 Rot. Parl. 108. Assignment of dower *de la plus beale*, Litt. § 49. Delivery of debtor's chattels by sheriff, St. Westm. II. c. 18. *Kearns v. Cunliffe*, 138 Mass. 434, 436.

be his share on the whole account paid to him; which is only a debt, or in the nature of a chose in action due to the estate of William."<sup>1</sup> In *M'Leod v. Drummond*<sup>2</sup> Lord Eldon says that Lord Hardwicke "frequently considered it as doubtful, whether even in the excepted cases any one except a creditor, or a specific legatee, could follow" the assets in equity. On the same page, *Hill v. Simpson*, 7 Ves. 152 (1802), is said to have been the first case which gave that right to a general pecuniary legatee.<sup>3</sup> *Hill v. Simpson* lays it down that executors in equity are mere trustees for the performance of the will,<sup>4</sup> but it adds that in many respects and for many purposes third persons are entitled to consider them absolute owners. Toward the end of the last century their fiduciary position began to be insisted on more than had been the case, and the common-law decisions which have been cited helped this tendency of the Chancery.<sup>5</sup>

The final step taken was taken in *M'Leod v. Drummond*,<sup>6</sup> when Lord Eldon established the rights of residuary legatees. "It is said in *Farr v. Newman* that the residuary legatee is to take the money, when made up: but I say, he has in a sense a lien upon the fund, as it is; and may come here for the specific fund."<sup>7</sup>

*Oliver Wendell Holmes.*

<sup>1</sup> *Thorne v. Watkins*, 2 Ves. Sen. 35, 36.

<sup>2</sup> 17 Ves. 152, 169 (1810).

<sup>3</sup> See also *M'Leod v. Drummond*, 14 Ves. 353, 354.

<sup>4</sup> P. 166. Note the recurrence with a difference to their original position in the early Frankish law. 1 Law Quart. Rev. 164.

<sup>5</sup> See also *Scott v. Tyler*, 2 Dickens, 712, 725, 726.

<sup>6</sup> 17 Ves. 152, 169.

<sup>7</sup> See *Marvel v. Babbitt*, 143 Mass. 226; *Pierce v. Gould*, 143 Mass. 234, 235; *Mechanics' Savings Bank v. Waite*, 150 Mass. 234, 235.

I made the decree appealed from in *Foster v. Bailey*, 157 Mass. 160, 162. The particular form which it took, allowing the defendant, the administrator of an administrator, to retain one share of stock and a savings-bank book as security for what might be found due to his intestate on the settlement of his account, and directing him to hand over the rest of the assets, was consented to, in case the defendant had a right to retain anything. I made the decree on the assumption that the change in the position of executor and administrator which I am considering left their rights undisturbed. Of course if the liability were only to account for a balance, the executor of an executor would not be bound to hand over anything more, and could not be compelled to pay anything until the balance was settled. His duty, when established, would not be to deliver specific property, but to pay a sum of money. I do not know what evidence can be found on this point. It is fair to mention that the plea offered in 30 Ed. I. 240, by executors of executors, was that, "We held none of the goods of the deceased on the day when this bill was delivered." But that may be no more than a general form. "Bonz" probably only meant property.



## SPECIALTY CONTRACTS AND EQUITABLE DEFENCES.

IT has been often said that a seal imports a consideration, as if a consideration were as essential in contracts by specialty as it is in the case of parol promises. But it is hardly necessary to point out the fallacy of this view. It is now generally agreed that the specialty obligation, like the Roman *stipulatio*, owes its validity to the mere fact of its formal execution. The true nature of a specialty as a formal contract was clearly stated by Bracton:—

“Per scripturam vero obligatur quis, ut si quis scripserit alicui se debere sive pecunia numerata sit sive non, obligatur ex scriptura, nec habebit exceptionem pecuniæ non numeratæ contra scripturam, quia scripsit se debere.”<sup>1</sup>

Bracton's statement is confirmed by a decision about a century later. The action was debt upon a covenant to pay £100 to the plaintiff upon the latter's marrying the defendant's daughter. It was objected that this being a debt upon a covenant touching marriage was within the jurisdiction of the spiritual court. But the common-law judges, while conceding the exclusive jurisdiction of the spiritual court if the promise had been by parol, gave judgment for the plaintiff, because this action was founded wholly upon the deed.<sup>2</sup> In another case it is said: “In debt upon a contract the plaintiff shall show in his count for what consideration (*cause*) the defendant became his debtor. Otherwise in debt upon a specialty (*obligation*), for the specialty is the contract in itself.”<sup>3</sup>

The specialty being the contract itself, the loss or destruction of the instrument would logically mean the loss of all the obligee's rights against the obligor. And such was the law. “If one loses his obligation, he loses his duty.”<sup>4</sup> “Where the action is upon a specialty, if the specialty is lost, the whole action is lost.”<sup>5</sup> The

<sup>1</sup> Bracton, 100, b.

<sup>2</sup> Y. B. 45 Ed. III. 24-30. To the same effect, Fitz. Ab. Dett. 166 (19 Rich. II.).

<sup>3</sup> Bellewe (ed. 1569) 111 (8 Rich. II.).

<sup>4</sup> Y. B. 27 Hen. VI. 9-1, per Danby.

<sup>5</sup> Y. B. 24 Ed. III. 24-1, per Shardelowe, with the approval of Stonore, C. J., and Wilughby, J. To the same effect, Y. B. 3 Ed. III. 31, b-1; Y. B. 4 Hen. IV. 17-14; Y. B. 4 Hen. VI. 17-1; Y. B. 19 Hen. VI. 6-11.

injustice of allowing the obligor to profit at the expense of the obligee by the mere accident of the loss of the obligation is obvious. But this ethical consideration was irrelevant in a court of common law. It did finally prevail in Chancery, which, in the seventeenth century, upon the obligee's affidavit of the loss or destruction of the instrument, compelled the obligor to perform his moral duty.<sup>1</sup> A century later the common-law judges, not to be outdone by the chancellors, decided, by an act of judicial legislation, that if profert of a specialty was impossible by reason of its loss or destruction, the plaintiff might recover, nevertheless, upon secondary evidence of its contents.<sup>2</sup>

The difference between the ethical attitude of equity and the unmoral (not immoral) attitude of the common law in dealing with specialty contracts appears most conspicuously in the treatment of defences founded upon the conduct of the obligee. As the obligee, who could not produce the specialty, was powerless at common law against an obligor, who unconscionably refused to fulfil his promise, so the obligor who had formally executed the instrument was, at common law, helpless against an obligee who had the specialty, no matter how reprehensible his conduct in seeking to enforce it. On the other hand, as equity enabled the owner of a lost obligation to enforce it against an unjust obligor, so also would the Chancellor furnish the obligor with a defence by enjoining the action of the obligee, whenever it was plainly unjust for him to insist upon his strict legal right.

Let us examine the usual defences in the light of the authorities.

<sup>1</sup> Equity seems to have proceeded rather cautiously in giving relief in the case of lost obligations. In 1579 an obligee obtained a decree against an obligor who had wrongfully obtained the specialty. *Charnock v. Charnock*, Tothill, 267. See also *King v. Hundon* (1615), Hob. 109; *Barry v. Style* (1625), Latch, 24; *Abdee's Case* (1625), Latch, 146. In 1625, in *Anon. Poph.* 205, Latch, 148, s. c., Doderidge, J., said: "The grantee of the rent-charge, having now lost his deed, can have no remedy in equity, for in this case *equitas sequitur legem*." Jones, J., and Whitlock, J., were of the same opinion; Doderidge, J., then added: "If the grantee had lost the deed by a casual loss, as by fire, &c., in such a case he shall have remedy in equity." See to the same effect, *Barry v. Style*, Latch, 24, per Jones, J., and *Abdee's Case*, Latch, 146. The earliest reported cases of equitable relief upon lost specialties belong to the last half of the seventeenth century. *Underwood v. Staney*, 1 Ch. Cas. 77; *Collet v. Jaques*, 1 Ch. Cas. 120; *Anon.* 1 Ch. Cas. 270; *Lightlove v. Weeden*, 1 Eq. Ab. 24, pl. 7; *Sheffield v. Castleton*, 1 Eq. Ab. 93, pl. 6.

<sup>2</sup> *Read v. Brookman*, 3 T. R. 151. This case was wholly without precedent at common law, was opposed to the opinion of Lord Hardwicke as expressed in *Atkins v. Farr*, 2 Eq. Ab. 247; *Walmesley v. Child*, 1 Ves. 341, 345; and *Whitfield v. Fausset*, 1 Ves. 387, 392, and did not commend itself to Lord Eldon in *Ex parte Greenway*, 6 Ves. 811, 812; *Princess of Wales v. Liverpool*, 1 Sw. 114, 119.



*Fraud.*—Startling as the proposition may appear, it is nevertheless true that fraud was no defence to an action at law upon a sealed contract. In 1835, in *Mason v. Ditchbourne*,<sup>1</sup> the defendant urged as a defence to an action upon a bond, that it had been obtained from him by fraudulent representations as to the nature of certain property; but the defence was not allowed. Lord Abinger said: "The old books tell us that the plea of fraud and covin is a kind of special *non est factum*, and it ends 'and so the defendant says it is not his deed.' Such a plea would, I admit, let in evidence of any fraud in the execution of the instrument declared upon: as if its contents were misread, or a different deed were substituted for that which the party intended to execute. You may perhaps be relieved in equity, but in a court of law it has always been my opinion that such a defence is unavailing, when once it is shown that the party knew perfectly well the nature of the deed which he was executing." This case was followed in 1861 in *Wright v. Campbell*,<sup>2</sup> Byles, J., remarking: "Surely, though you shewed the transaction out of which it arose to have been fraudulent, yet in an action at *law*, on the *deed*, that would not be available as a *legal* defence."

Under the Common Law Procedure Act of 1854, § 83, fraud was pleadable in such cases as an equitable plea; for, from very early times, equity would grant a permanent unconditional injunction against an action upon a specialty got by fraud.<sup>3</sup>

In the United States there are numerous decisions disallowing the defence of fraud in an action at law upon a specialty.<sup>4</sup> This is still the rule in the Federal courts, and was applied in 1894.<sup>5</sup>

<sup>1</sup> 1 M. & Rob. 460, 2 C. M. & R. 720 n. (a) s. c.

<sup>2</sup> 2 F. & F. 393. See also *Bignold v. Bignold*, 1 Mad. Ch. Pr. (3d ed.) 383; *Spencer v. Handley*, 4 M. & Gr. 414, 419.

<sup>3</sup> *Savill v. Wolfall* (1584), Ch. Cas. Ch. 174, 175; *Glanvill v. Jennings*, Nels. Ch. 129; *Lovell v. Hicks*, 2 Y. & C. Ex. 46.

<sup>4</sup> *Hartshorn v. Day*, 19 How. 211, 222; *George v. Tate*, 102 U. S. 564; *Shampeon v. Connecticut Co.*, 42 Fed. R. 760; *Vandervelden v. Chicago Co.*, 61 Fed. R. 54; *Kennedy v. Kennedy*, 2 Ala. 571, 592; *Halley v. Younge*, 27 Ala. 203; *White v. Watkins*, 23 Ill. 480, 482, 483; *Gage v. Lewis*, 68 Ill. 604, 613; *Huston v. Williams*, 3 Blackf. 170; *Scott v. Perrin*, 4 Bibb, 360; *Montgomery v. Tipton*, 1 Mo. 446; *Burrows v. Alter*, 7 Mo. 424; *Rogers v. Colt*, 1 Zab. 704; *Stryker v. Vanderbilt*, 1 Dutch. 482 (see also *Connor v. Dundee Works*, 50 N. J. 257, 46 N. J. Eq. 576); *Vrooman v. Phelps*, 2 Johns. 177; *Dorr v. Munsell*, 13 Johns. 430; *Franchot v. Leach*, 5 Cow. 506; *Champion v. White*, 5 Cow. 509; *Dale v. Roosevelt*, 9 Cow. 307; *Belden v. Davies*, 2 Hall, 433; *Guy v. McLean*, 1 Dev. 46; *Greathouse v. Dunlap* (Ohio), 3 McL. 302, 306; *Wyche v. Macklin*, 2 Rand. 426.

<sup>5</sup> *Vandervelden v. Chicago Co.*, 61 Fed. R. 54.

But nearly all, if not all of the State decisions just cited, have lost their force by reason of statutory changes, so that the obligor is no longer required to resort to equity for relief. In a few States, chiefly in those where there was, in the early days, no Court of Chancery, the defence of fraud was allowed to a specialty obligor without the aid of a statute.<sup>1</sup>

*Illegality.* — If the illegality of a contract under seal appeared on the face of the instrument, no court would sanction the obvious scandal of a judgment in favor of the obligee.<sup>2</sup> But if the specialty was irreproachable according to its tenor, the common law, prior to 1767, did not permit the obligor to defeat the obligee by showing that the instrument was in fact given for an illegal or immoral purpose.<sup>3</sup> The only remedy of the obligor was a bill in equity for an injunction against the action at law. Such bills were very common.<sup>4</sup>

But the common-law rule was changed in 1767 by *Collins v. Blanter*<sup>5</sup> which sanctioned the *legal* defence of illegality. The opinion of the court delivered by Wilmot, C. J., bears the unmistakable signs of an innovation. "We are all of opinion that the bond is void *abi initio* by the common law, by the civil law, moral law, and all law whatever." And yet the learned judge was unable to cite a single authority. "I should have been extremely sorry if this case had been without remedy at common law. *Est boni judicis ampliare jurisdictionem.*" This decision, being before the Revolution, was naturally followed in this country.

*Failure of Consideration.* — As fraud and illegality were not legal defences to an action upon a specialty, no one will be surprised

<sup>1</sup> *Union Bank v. Ridgely*, 1 Har. & G. 324, 416; *Edelin v. Sanders*, 8 Md. 118, 131; *Dorsey v. Monnett* (Md. 1890), 20 Atl. R. 196; *Partridge v. Messer*, 14 Gray, 180; *Milliken v. Thorndike*, 103 Mass. 382; *Stubb v. King*, 14 S. & R. 206, 208; *McCulloch v. McKee*, 16 Pa. 289; *Phillips v. Potter*, 7 R. I. 289; *Gray v. Hankinson*, 1 Bay, 278; *Means v. Brickett*, 2 Hill, Ch. 657.

<sup>2</sup> Y. B. 2 Hen. IV. 9-44; *Thompson v. Harvey*, Comb. 121; *Taylor v. Clarke*, 2 Show. 345; *Norfolk v. Elliott*, 1 Lev. 209, Hard. 464, S. C.

<sup>3</sup> *Macrowe's Case* (1585), Godb. 29, pl. 38; *Brook v. King* (1588), 1 Leon. 73; *Jones's Case*, 1 Leon. 203; *Oldbury v. Gregory* (1598), Moore, 564 (*semble*); *Jenk. Cent. Cas.* 108; *Law v. Law* (1735), Cas. t. Talb. 140. See also *Andrews v. Eaton* (1729), Fitzg. 73; *Downing v. Chapman* (1765), 9 East, 414, n. (a).

<sup>4</sup> *Tothill* (ed. 1649), 26, 26, 27, 27; *Tothill* (ed. 1671), 27, 81, 84, 86; 1 Vern. 348, 411, 412, 475; 2 Vern. 70, 291, 652, 764; *Blackwell v. Redman*, 1 Ch. Rep. 88; *Hall v. Potter*, 3 Lev. 411; *Kemp v. Coleman*, 1 Salk. 156; *Law v. Law*, 3 P. Wms. 391; *Rawden v. Shadwell*, Amb. 269; *Newman v. Franco*, 2 Anst. 519; *Andrew v. Berry*, 3 Anst. 634; *Harrington v. Duchatel*, 1 Bro. C. C. 124.

<sup>5</sup> 2 Wils. 341.



to find that the rule was the same as to failure of consideration. The doctrine is explicitly stated by Bracton: "*Nec habebit exceptionem pecunie non numerate contra scripturam.*"<sup>1</sup> A case of the time of Henry VI.<sup>2</sup> illustrates pointedly the purely equitable nature of the obligor's relief, and also the possibly limited scope of that relief. The obligor, being sued at law, applied to the Chancellor for relief, on the ground that he had not received any part of the expected equivalent for which he had executed his bond. The Chancellor consulted the judges of both Benches, who were all of opinion, that in conscience the obligee ought to surrender the bond or execute a release. The Chancellor made a decree accordingly against the obligee.<sup>3</sup> The latter, however, refused to give up the bond or to release it, and was thereupon committed to the Fleet for contempt. He persisted however, although in prison, in the prosecution of his action at law, and the same judges of the Common Bench, who had advised the Chancellor to make his decree against the obligee, now gave judgment at law in his favor. The judges were clearly right both as to their advice and their subsequent judgment. Equity acts *in personam*, not *in rem*. The Chancellor could imprison the obligee for disobedience of his decree, but he could not nullify the bond. After 1854 obligors could make use of the statutory equitable plea of failure of consideration, which was an absolute bar to the action.

The English rule against the admissibility of failure of consideration as a defence at law was followed in this country in a number of early decisions;<sup>4</sup> but, by statute, these decisions no longer govern except in the Federal Courts.<sup>5</sup>

<sup>1</sup> Bracton, 100, b.

<sup>2</sup> Y. B. 37 Hen. VI. 13-3.

<sup>3</sup> See also Savell v. Romsden (Ed. VI.), 1 Cal. Cl. cxxxi; Tourville v. Naish, 3 P. Wms. 307.

<sup>4</sup> Hartshorn v. Day, 19 How. 211, 222; Leonard v. Bates, 1 Blackf. 172; Huston v. Williams, 3 Blackf. 170, 171; Fitzgerald v. Smith, 1 Ind. 310, 313; Bates v. Hinton, 4 Mo. 78; Hoitt v. Holcomb, 23 N. H. 535, 554; Doolan v. Sammis, 2 Johns. 179 n.; Dorr v. Munsell, 13 Johns. 430; Parker v. Parmele, 20 Johns. 130. The opposite rule was adopted in South Carolina, Gray v. Handkinson, 1 Bay, 278; Adams v. Wylie, 1 N. & Mc. 78; Tunno v. Fludd, 1 McC. 121; and in Pennsylvania, McCulloch v. McKee, 16 Pa. 289.

<sup>5</sup> The framers of the New York statute, 2 Rev. St. 406, § 77, seem not to have discriminated between the failure of an expected consideration, and the absence of a consideration where none was intended. By making the seal "only presumptive evidence of a sufficient consideration which may be rebutted," they not only let in an equitable defence at law, but also abolished gratuitous sealed obligations altogether.

*Payment.*—How completely ethical considerations were ignored by the common-law judges in dealing with formal contracts, is shown by the numerous cases deciding that a covenantor who had paid the full amount due, but without taking a release, must, nevertheless, pay a second time, if the obligee was unconscionable enough to bring an action on the specialty.<sup>1</sup> Nay, more, even though the specialty was upon payment surrendered to the obligor, the latter was still not safe unless he cancelled or destroyed the specialty. For, if the obligee should afterwards get possession of the instrument, even by a trespass, the obligor, notwithstanding the payment, the surrender, and the trespass, would have no defence to an action at law by the obligee, "because of the mischief that would befall the plaintiff if one should be received to avoid an obligation by such averment by bare words, and also because there is no mischief to the defendant if his plea be true, since he may have a writ of Trespass for the carrying off of the obligation, and recover damages for the loss sustained in this action."<sup>2</sup>

As in the case of fraud and illegality, so in the case of payment. Equity at length gave relief to the obligor by restraining actions at law. In 1483, Chancellor Rotheram asked the advice of the judges as to the propriety of issuing an injunction against the recognizee in a statute-merchant which had been paid by the recognizer. The judges were opposed to the injunction, Hussey, C. J., saying: "It is less of an evil to make obligors pay a second time for their negligence than to disprove matter of record or specialty by two witnesses." The Chancellor remarked that it was the common course in Chancery to grant a subpoena in the case of a specialty. In the end, however, in deference to the judges,

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<sup>1</sup> "And although the truth be, that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law; for if matter in writing may be so easily defeated and avoided by such surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact." Dy. 51, pl. 15. See to the same effect, Anon. (1200) 2 Rot. Cur. Reg. 207; Y. B. 20 & 21 Ed. I. 305; Y. B. 5 Ed. III. 63-106; Y. B. 20 Hen. VI. 28-21; Y. B. 22 Ed. IV. 51-8; Anon. (1537) Dy. 25, pl. 60; Nichol's Case (1565), 5 Rep. 43, Cro. El. 455 s. c.; Kettleby v. Hales (1684), 3 Lev. 119; Mitchell v. Hawley, 4 Den. 414, 418, and the cases cited in the next note.

<sup>2</sup> Y. B. 5 Hen. IV. 2-6; Y. B. 22 Hen. VI. 52-24; Y. B. 37 Hen. VI. 14-3; Y. B. 5 Ed. IV. 4-10; Y. B. 1 Hen. VII. 14-2; Waberley v. Cockerell, Dy. 51, pl. 12; Cross v. Powell, Cro. El. 483; Atkins v. Farr, 2 Eq. Ab. 247; Lacey v. Lacey, 7 Barr. 251, 253. In the last case Gibson, C. J., said: "Even if a bond, thus delivered [to the obligor] but not cancelled, come again to the hands of the obligee, though it be valid at law, the obligor will be relieved in equity."



he declined to issue a subpoena in the case before him, as it concerned a record obligation, and reserved his judgment as to what should be done in the case of a specialty.<sup>1</sup> But the common course of relieving the obligor of a paid specialty was adhered to,<sup>2</sup> and was later extended to the case of the paid record obligation.<sup>3</sup>

In 1707, by St. 4 & 5 Anne, c. 16, § 11, payment without a release was made a valid legal defence.

*Accord and Satisfaction.* — From time immemorial the acceptance of anything in satisfaction of the damages caused by a tort would bar a subsequent action against the wrong-doer.<sup>4</sup> Accord and satisfaction was, likewise, a bar to an action for damages arising from a breach of a covenant.<sup>5</sup> But if the covenant was of such a nature as to create a debt, the creditor's right to maintain an action at law was in no wise affected, although he might have received, in satisfaction of the debt, property far exceeding in value the amount due by the specialty.<sup>6</sup> "There is a difference where a duty accrues by the deed in certainty, *tempore confectiois scripti*, as by covenant, bill, or bond to pay a sum of money; there this certain duty takes its essence and operation originally and solely by the writing; and therefore it ought to be avoided by a matter of as high a nature, although the duty be merely in the personalty. But where no certain duty accrued by the deed, but a wrong or default subsequent together with the deed gives an action to recover damages, which are only in the personalty; for such wrong or de-

<sup>1</sup> Y. B. 22 Ed. IV. 6-18.

<sup>2</sup> Y. B. 7 Hen. VII. 12-2; Doct. & St., Dial. I. c. 12, Dial. II. c. 6; Cavendish v. Forth, Toth. 90; Dowdenay v. Oland, Cro. El. 708; Huet v. De la Fontaine, Toth. 273. In the Treatise on Subpœna in the appendix to Doct. & St. (18th Ed.) the practice of giving equitable relief to the obligor is vigorously attacked by a Sergeant-at-law, who says; "I marvel much what authority the Chancellor hath to make such a writ in the king's name, and how he dare presume to make such a writ to let [hinder] the king's subjects to sue his laws, the which the king himself cannot do righteously; . . . and so meseemeth that such a suit by a subpoena is not only against the law of the realm, but also against the law of reason. Also, meseemeth, that it is not conformable to the law of God. For the law of God is not contrary in itself, *i. e.* to say one in one place and contrary in another place."

<sup>3</sup> Clethero v. Beckingham, Toth. 276.

<sup>4</sup> Anon. Y. B. 21 & 22 Ed. I. 586; Y. B. Hen. VI. 25-13; Y. B. 34 Hen. VI. 43-44; Andrew v. Boughey, Dy. 75, pl. 23.

<sup>5</sup> Blake's Case, 6 Rep. 43, b., Cro. Jac. 99 s. c.; Eeles v. Lambert, Al. 38; Spence v. Healey, 8 Ex. 668; Mitchell v. Hawley, 4 Den. 414.

<sup>6</sup> Preston v. Christmas, 2 Wils. 86; Mussey v. Johnson, 1 Ex. 241; Steeds v. Steeds, 22 Q. B. D. 537; Savage v. Blanchard, 148 Mass. 348, 350; Mitchell v. Hawley, 4 Den. 414.

fault accord with satisfaction is a good plea."<sup>1</sup> In other words, the breach of a covenant sounding in damages, like the breach of an assumpsit, seems to have been conceived of as a tort;<sup>2</sup> whereas a specialty debt was the grant by deed of an immediate right, which must subsist until either the deed was cancelled or there was a reconveyance by a deed of release. This continued the rule at common law until 1854, when the specialty debtor was, by statute, allowed to bar the satisfied creditor by a plea on equitable grounds;<sup>3</sup> for he was plainly entitled before this time to a permanent unconditional injunction.<sup>4</sup>

*Discharge of Surety.* — It is a familiar doctrine of English law that a creditor, who agrees to give time to a principal debtor, thereby discharges the surety unless he expressly reserves his right against the latter. But if the surety's obligation was under seal, his only mode of resisting the creditor on the ground of such indulgence was by applying to a Court of Equity for an injunction.<sup>5</sup> He had no *legal* defence to the creditor's action.<sup>6</sup> The rule was the same in England, and in a few of our States, where the principal and surety were co-makers of a promissory note.<sup>7</sup>

The English statute of 1854, introducing pleas on equitable grounds, now gives the surety an equitable defence at law. And, generally, in this country the defence has been allowed to actions on notes without the aid of a statute.<sup>8</sup>

<sup>1</sup> Blake's Cas. 6 Rep. 43, b.

<sup>2</sup> "And when it [the covenant] is broken, the action is not founded merely upon the specialty as if it were a duty, but savors of trespass, and therefore an accord is a good plea to it." *Eeles v. Lambert*, Al. 38. "But the cause of action accrues by the tort subsequent." *Rabbetts v. Stoker*, 2 Roll. R. 187, 188. "Covenant is executory and sounds only in damages, and a tort, which (as it seems) dies with the person," per Baldwin, J., in *Anon. Dy. 14*. See also Sir Frederick Pollock's "Contracts in Early English Law," 6 HARVARD LAW REVIEW, 400.

<sup>3</sup> *Steeds v. Steeds*, 22 Q. B. D. 537. See also *Savage v. Blanchard*, 148 Mass. 348, 350.

<sup>4</sup> *Webb v. Hewitt*, 3 K. & J. 438.

<sup>5</sup> *Rees v. Berrington*, 2 Ves. Jr. 542.

<sup>6</sup> *Bulsteel v. Jarrold*, 8 Price, 467; *Davey v. Prendergrass*, 5 B. & Al. 187; *Ashbee v. Pidduck*, 1 M. & W. 564; *Parker v. Watson*, 8 Ex. 404; *Sprigg v. Mt. Pleasant Bank*, 10 Pet. 257; *U. S. v. Howell*, 4 Wash. C. C. 620; *Locke v. U. S.*, 3 Mass. 446; *Wittmer v. Ellison*, 72 Ill. 301; *Tate v. Wymond*, 7 Blackf. 240; *Lewis v. Harbin*, 5 B. Mon. 564; *Pintard v. Davis*, Spencer, 205; *Shaw v. McFarlane*, 1 Ired. 216; *Holt v. Bodey*, 18 Pa. 207; *Dozier v. Lee*, 7 Humph. 520; *Burke v. Cruger*, 8 Tex. 66; *Step-toe v. Harvey*, 7 Leigh. 501; *Sayre v. King*, 17 W. Va. 562.

<sup>7</sup> *Pooley v. Harradine*, 7 E. & B. 431; *Yates v. Donaldson*, 5 Md. 389; *Anthony v. Fritts*, 45 N. J. 1.

<sup>8</sup> 2 Ames, Cas. on Bills and Notes, 82 n. 2.



*Accommodation.* — An obligee, for whose accommodation the obligor has executed an instrument under seal, certainly ought not to enforce the specialty against the obligor who has befriended him, and whom, by the very nature of the transaction, he was bound to save harmless from any liability to any one. But prior to 1854 the obligor would have had no defence at law to an action by the obligee. In *Shelburne v. Tierney*,<sup>1</sup> a bill filed by the obligor to restrain an action by the obligee was assumed by both parties to be valid, but was defeated by an answer showing that the action, although in the name of the obligee, was really brought in behalf of an assignee of the obligation. The facts were similar in *Dickson v. Swansea Co.*,<sup>2</sup> except that the obligor pleaded an equitable plea instead of filing a bill, and the obligee met this by an equitable replication to the same effect as the answer to the bill in *Shelburne v. Tierney*.<sup>3</sup>

*Duress.* — The general rule, that the misconduct of the obligee in procuring or enforcing a specialty obligation was no bar at common law to an action upon the instrument, was subject to one exception. As far back as Bracton's time, at least, one who had duly signed and sealed an obligation, and who could not therefore plead *non est factum*, might still defeat an action by pleading affirmatively that he was induced to execute the specialty by duress practised upon him by the plaintiff.<sup>4</sup> The Roman law was more consistent than the English law in this respect. For, by the *jus civile*, duress, like fraud, was no answer to a claim upon a formal contract. All defences based upon the conduct of the obligee were later innovations of the prætor, and were known as *exceptiones prætorie*, or as we should say, equitable defences.<sup>5</sup>

It is quite possible that the anomalous allowance of the defence of duress at common law may be due to some forgotten statute.<sup>6</sup>

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<sup>1</sup> Bro. C. C. 434.

<sup>2</sup> L. R. 4 Q. B. 44.

<sup>3</sup> For similar decisions see *Farrar v. Bank of N. Y.*, 90 Ga. 331; *Meggett v. Baum*, 57 Miss. 22; *Freund v. Importer's Bank*, 76 N. Y. 352. But see *contra*, *Wetter v. Kiley*, 95 Pa. 461.

<sup>4</sup> Bracton, 16, b, 17.

<sup>5</sup> The learned reader who desires to study the nature of Roman *exceptio* will find the subject thoroughly discussed in Eisele, *Die materielle Grundlage der Exceptio*; Zimmermann, *Kritische Bemerkungen zu Eisele's Schrift*; Lenel, *Ueber Ursprung und Wirkung der Exceptionen*.

<sup>6</sup> The language of Britton, 1 Nich. Br. 47, is certainly significant: "We will that contracts made in prison shall be held valid unless made under such constraint as includes fear of death or torture of body; and in such case they shall reclaim their

But whatever its origin, the defence of duress does not differ in its nature from the defence of fraud. As Mr. Justice Holmes well says: "The ground upon which a contract is voidable for duress is the same as in the case for fraud; and is that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action."<sup>1</sup> Duress was, therefore, never regarded as negating the legal execution of the obligation. "The deed took effect, and the duty accrued to the party, although it were by duress and afterwards voidable by plea."<sup>2</sup> The defence is strictly personal, and not real; that is, it is effective, like all equitable defences, only against the wrong-doer, or one in privity with him. Duress by a stranger cannot, therefore, be successfully pleaded in bar of an action by an innocent obligee;<sup>3</sup> and duress by the payee upon the maker of a negotiable note will not affect the rights of a subsequent *bona fide* holder for value.<sup>4</sup>

By statute or judicial innovation, as we have seen, the jurisdiction of the common-law courts has been greatly extended, except in the Federal Courts of this country, in the matter of defences to actions on formal contracts. In all cases, where, formerly, a defendant was obliged to apply to equity for relief against an unconscionable plaintiff, he may now defeat his adversary at law. But the change of forum does not mean any change in the essential character of the relief. The common law accomplishes, by peremptorily barring the action, the same result, and upon the same grounds, that the Chancellor effected by a permanent unconditional injunction.

deeds as soon as they are at liberty and signify the fear they were under to their nearest neighbors and to the coroner; and if they do not reclaim such deeds by plaint within the year and day, the deeds shall be valid." See also 1 Nich. Britt. 223; Bract. 16, b, 17; 2 Bract. N. B. Nos. 182, 200; 3 Bract. N. B. Nos. 1643, 1913.

<sup>1</sup> Fairbanks v. Snow, 145 Mass. 152, 154.

<sup>2</sup> Y. B. 8 Hen. VI. 7-15, per Martin, J. Duress was not admissible under a plea of *non est factum*. Y. B. 7 Ed. IV. 5-15; Y. B. 1 Hen. VII. 15, b-2; Y. B. 14 Hen. VIII. 28, a-7; Whelpdale's Case, 5 Rep. 119. On the same principle, a feoffment under duress was effectual as a transfer of the seisin. Y. B. 2 Ed. IV. 21-16; Y. B. 18 Ed. IV. 29-27.

<sup>3</sup> Y. B. 45 Ed. III. 6-15 (*semble*); Anon. Keilw. 154, pl. 3; Fairbanks v. Snow, 145 Mass. 152.

<sup>4</sup> Duncan v. Scott, 1 Camp. 100 (*semble*); Beals v. Neddo, 1 McCrary, 206; Hogan v. Moore, 48 Ga. 156; Lane v. Schlemmer, 114 Ind. 296; Bank v. Butler, 48 Mich. 192; Briggs v. Ewart, 51 Mo. 249 (*semble*); Clark v. Pease, 41 N. H. 414. Similarly a grantor under duress cannot recover his property if the wrong-doer has conveyed it to an innocent purchaser. Rogers v. Adams, 66 Ala. 600; Deputy v. Stapleford, 19 Cal. 302; Bazemore v. Freeman, 58 Ga. 276; Lane v. Schlemmer, 114 Ind. 296; Mundy v. Whittemore, 15 Neb. 647; Schroader v. Decker, 9 Barr, 14; Cook v. Moore, 39 Tex. 255; Tallay v. Robinson, 22 Grat. 888.



tion. It is as true to-day as it ever was, that fraud, payment, and the like, do not nullify the title of the fraudulent or paid obligee, but are simply conclusive reasons why he ought not to enforce his title.

The truly equitable or personal character of these defences at law has commonly only a theoretical value in actions upon the ancient common-law specialty, the instrument under seal.<sup>1</sup> But it is of the highest practical importance in actions upon the modern mercantile specialty, the bill of exchange or promissory note.<sup>2</sup> For the legal title to bills and notes, by reason of their negotiability, passes freely from hand to hand, and equity would not restrain, by injunction, any holder from enforcing his title, if he came by it honestly and for value. And the plea at law being, in substance, like the bill in equity for an injunction, we see at once the reason for the familiar rule that fraud and other defences, based upon the conduct of the payee or some other particular person, cannot be successfully pleaded against any *bona fide* holder for value.

*James Barr Ames.*

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<sup>1</sup> But the equitable nature of these defences explains the right of an innocent obligee to recover in covenant even though the defendant was induced to execute it by the improper conduct of a third person.

<sup>2</sup> Because *assumpsit* would lie upon them, the notion became current that bills and notes were simple contracts. In Scotland, and in Europe generally, a bill or note is recognized to be a *literarum obligatio*, and the logic of facts is sure to compel, eventually, a similar recognition in England and this country.

## A PROBLEM AS TO RATIFICATION.

IF a person whom I have not authorized to act as my agent has made in my name with a third person a contract composed of mutual promises, and if the third person, who originally believed in the authority of the assumed agent, has withdrawn from the transaction and has communicated his withdrawal to the assumed agent or to me, can I, nevertheless, thereafter, promptly upon learning of the contract, ratify the contract and hold the third person? In short, by ratifying an unauthorized bilateral contract can I hold the adverse party, although he has already withdrawn from the contract?

The questions underlying the problem go to the very foundation of the doctrine of ratification; and hence the problem, whether it arises often or not, seems worthy of discussion. Another reason for discussion is that, as to the solution, lawyers have held, and still hold, divergent opinions. To reconcile the opinions, or even to prove by undisputed argument that some one solution is theoretically correct, must be recognized as an impossible task, simply because of the absence of conceded elementary principles. Yet Agency, it should be remembered, is not a new branch of law, and ratification, as a mode of creating liabilities in Agency, is so old that cases are found in the Year-Books, and even earlier.<sup>1</sup>

In dealing with this problem, as with any other as to ratification, one first instinctively turns to the familiar and ancient maxim to the effect that ratification relates back, and is thereupon analogous or equivalent to original authorization. Bracton, obviously following language used by the Roman lawyers,<sup>2</sup> says: "Ratihabitio in hoc casu comparatur mandato."<sup>3</sup> In a case decided in 1302 it is said: "Ratihabitio retro trahitur et mandato comparatur."<sup>4</sup> Coke

<sup>1</sup> See, for example, a case decided in 23 H. VIII. (1238-9), reported in Bracton's Note Book (edited by Maitland), pl. 1243.

<sup>2</sup> In the Digest, lib. 43, tit. 16, l. 1, § 14, Ulpian speaks of Sabinus and Cassius, "qui rati habitionem mandato comparant," and says "rectius enim dicitur, in maleficio rati habitionem mandato comparari." Again, in lib. 46, tit. 3, l. 12, § 4, Ulpian says: "Rati enim habitio mandato comparatur." And see Story on Agency, § 239.

<sup>3</sup> Bracton de Legibus, f. 171 b.

<sup>4</sup> Dean and Chapter of Exeter v. Serle de Lanlarazon, Y. B. 30 Ed. I. (edited by Horwood in the Rolls Series), 126, 129.



says: "Omnis ratihabitio retro trahitur et mandato æquiparatur."<sup>1</sup> "Comparatur" and "æquiparatur" are certainly not quite synonymous; but it seems that changes in language do not necessarily indicate a difference in doctrine,<sup>2</sup> nor even an attempt to secure greater accuracy. Bracton, Coke, and all the lawyers of the three centuries separating them used Latin in their profession as almost a living language. In that state of facts, to substitute one Latin word for another, or to add a word here and there, was easy and natural; and perhaps this is the reason why paraphrase rather than quotation is common in the early books.

The several forms of the maxim, substantially identical in language and precisely identical in spirit, have been used so long as to make it certain that they are accurate descriptions of the general effect of ratification. Unquestionably ratification and original authorization are similar; and unquestionably ratification, unless some rule prevents it from having efficacy, relates back, and is thereupon substantially equivalent to original authorization. Yet there are many instances where ratification is wholly inefficacious, where relation does not take place, and where ratification and original authorization turn out to be very different things indeed. Of course too much must not be expected from any maxim. The whole law cannot be compressed into a sentence. In this particular instance the maxim carries upon its very face a warning to those who would use it as an infallible panacea. When a maxim says that two actually distinct things are equivalent, it obviously represents simply an approximation to accuracy; and when it lays down as an invariable rule a doctrine of relation, it gives emphatic notice that in many cases the solution prescribed by the rule must be disregarded. Hence, it is not at all strange that the ancient maxim as to ratification gives for many problems inadequate solutions or none at all, and that it has had to receive elaborate appendices defining the cases in which ratification is possible. One of these supplemental rules is that ratification is impossible if, meanwhile, rights of strangers have intervened;<sup>3</sup> and apparently this is true whether such strangers did or did not know of the original transaction.<sup>4</sup> A

<sup>1</sup> Co. Lit. 207 a.

<sup>2</sup> An opposite view is expressed by Mr. Justice Holmes, in 5 HARVARD LAW REVIEW, 12.

<sup>3</sup> Bird v. Brown, 4 Exch. 786 (1850); Pollock v. Cohen, 32 Ohio St. 514 (1877).

<sup>4</sup> This seems a fair inference from Wood v. M'Cain, 7 Ala. 800 (1845), Taylor v. Robinson, 14 Cal. 396 (1859), and the cases in the preceding note; but see, *contra*, Wharton on Agency, § 80. It may be of importance to inquire whether the stranger was simply acting maliciously. Bowen v. Hall, 6 Q. B. D. 333 (1881).

second is that ratification is incapable of giving rights against the third person if the unauthorized act, for example a notice to quit, called upon him to do some act which, in the absence of authority on the part of the assumed agent, would be unnecessary, — in short to do something promptly, in reliance upon ultimate ratification.<sup>1</sup> A third is that ratification is impossible if the assumed agent and the third person have meanwhile agreed to cancel the unauthorized transaction.<sup>2</sup> These supplemental rules indicate that, though in legal theory a ratification causes a relation back to the time of the original transaction and vivifies the original transaction throughout the whole intervening time, it is quite impossible to ignore the actual facts as to the temporary unenforceability of the transaction and as to the vast and controlling effect of the ultimate ratification. In short, these supplemental rules indicate that the enforceability of the transaction really arises at the time of the ratification, and is incapable of arising then if absurd or unjust results would follow.

The first supplemental rule stated above indicates that ratification will not be permitted to work injustice toward strangers. The second indicates that, pending ratification, even the third person, in some cases at least, may disregard the possibility of the assumed principal's eventually wishing to adopt the act of the unauthorized agent, and that here also ratification will not be permitted to work injustice. It may be suggested that in this second rule there is an intimation that ratification demands the concurrence of the principal and of the third person; but the fact is that the second rule is always conceived to be a mere application of a general principle that the doctrine of relation, being a fiction, must be disregarded whenever injustice would otherwise result. The third rule appears to be the most interesting of all. It is obviously not based upon a doctrine that an authorized agent making a contract has actual or apparent authority to cancel the contract; for there is no such doctrine. Is it based upon a doctrine that an unauthorized agent has a wider actual or apparent authority over the contract than an authorized agent would have? Apparently not; and apparently the underlying theory is not that the unauthorized agent has rights deserving protection; for though his unauthorized act, if

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<sup>1</sup> *Right v. Fisher v. Cuthell*, 5 East, 491 (1804). If the third person does the act, it seems that ratification will have full effect.

<sup>2</sup> *Walter v. James*, L. R. 6 Ex. 124 (1871).



never ratified, may make him liable to an action in case he really misled the third person, that liability was deliberately incurred by the unauthorized agent, and there seems no reason why the law should in his interest create an exception to even so elastic a fiction as the doctrine of relation. The real principle underlying this third rule seems to be that the third person is entitled to protect himself against the uncertainty as to ratification. The third rule, therefore, seems to rest upon the same basis as the second,—the right of the third person to insist that the doctrine of relation shall not do him an injustice. It goes much further than the second rule, however; for it permits the third person, co-operating with the unauthorized agent, to cancel a transaction to which he actually assented; and obviously it goes further than the first rule, which simply protects strangers. Thus it seems that the third rule really rests upon a doctrine of its own, a doctrine that, though an unauthorized agent cannot be said to have power to cancel the transaction, and though the third person cannot disregard the transaction silently as if he were a stranger, the third person can withdraw his assent to the original transaction by communicating such withdrawal to the person with whom the original transaction actually was had, and this withdrawal entitles the third person thereafter to treat the transaction as a nullity and to insist that a ratification would do him an injustice.

It is already obvious that the maxim *ratihabitio retro trahitur* does not cover the whole ground. Indeed, it ought to be noticed that the maxim does not purport to indicate in what cases ratification is capable of taking place. It simply states that, if ratification does take place, it relates back and thereupon leads to results resembling those flowing from original authorization. To supplemental rules, several of which have been stated above, is left the designation of the instances in which ratification is possible. The general principles underlying possibility of ratification appear to be that the transaction in fact does not have full validity until there is ratification, and that this fact must be borne in mind in each individual case, and that in each case the question is whether in the light of this actual fact ratification would lead to absurd or unjust results. These general principles, and the more specific rules underlying them, cast interesting and valuable, though not adequate, light upon the general question as to the nature of an unauthorized contract in the time succeeding apparent formation and preceding ratification. Upon that general question there is no occasion

now to enter, save in so far as it bears upon the problem stated at the beginning of this article.

As furnishing solutions of this problem several theories can be advanced; and these will now be discussed.

The first theory is the one for which the chief authority is *Dodge v. Hopkins*,<sup>1</sup> a case decided by the Supreme Court of Wisconsin in 1861. In that case the doctrine of the court, as explained in the opinion, was that, as the principal's actual assent is not contained in the original transaction, the adverse party is not then bound; that consequently the original transaction is wholly nugatory; that consequently a ratification by the principal will not give him rights unless subsequently assented to by the adverse party.<sup>2</sup> To this line of argument there are obvious objections. To take the last point first, it seems more natural to say that the adverse party assented originally, did not withdraw his assent before ratification, was capable of assenting then, and consequently must be taken to have assented still. Again, the assumption that an originally unauthorized transaction entered into in the name of a principal is, as between that principal and the adverse party, a mere nullity, seems to do away with the whole doctrine of ratification. Ratification cannot, even with the aid of a doctrine of relation, render that effective which was once a mere nullity. If the original transaction was a nullity, and if the assent of the adverse party must be obtained again, and if the effect of the ratification and of the renewed assent is to make a binding contract, it seems that the real con-

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<sup>1</sup> 14 Wis. 630. The case is followed in *Atlee v. Bartholomew*, 69 Wis. 43 (1887). The doctrine is attacked in an editorial note in 5 Am. St. Rep. 109. That note is answered in an article by F. R. Mechem in 24 Am. L. Rev. 580; and to the latter discussion there is a reply by F. A. Sondley in 25 Am. L. Rev. 74.

<sup>2</sup> Dixon, C. J., delivering the opinion of the court, said: "It is very clear . . . that the plaintiff was not bound by the contract and that he was at liberty to repudiate it at any time before it had actually received his sanction. Was the defendant bound? And if he was not, could the plaintiff, by his sole act of ratification, make the contract obligatory upon him? We answer both these questions in the negative. The covenants were mutual—those of the defendant for the payment of the money being in consideration of that of the plaintiff for the conveyance of the lands. The intention of the parties was that they should be mutually bound,—that each should execute the instrument so that the other could set it up as a binding contract against him . . . from the moment of its execution. In such cases it is well settled . . . that if either party neglects or refuses to bind himself, the instrument is void for want of mutuality, and the party who is not bound cannot avail himself of it as obligatory upon the other. . . . The same authorities also show that where the instrument is thus void in its inception, no subsequent act of the party who has neglected to execute it can render it obligatory upon the party who did execute, without his assent."



tract is a new one, and is not the old transaction; for though the old transaction supplies the terms, the new one alone supplies the assent of each of the parties. The doctrine of ratification, according to this theory, seems to disappear.<sup>1</sup> As indicating the court's point of view, and also as diminishing materially the force of *Dodge v. Hopkins* as an authority, it should be noticed that the only cases upon which the court relied are cases in which an actually authorized agent and an adverse party entered into a contract under seal, which, though conceded to be within the agent's authority, failed to bind the principal because it was expressed and signed in such way as not to make the principal an actual party to the contract.<sup>2</sup> In those cases it was necessarily held that the original contract failed to bind the principal; that, as it obviously contemplated mutual promises binding the principal and the third person to each other, it also failed to bind the third person; that consequently it was wholly invalid; and that it was incapable of becoming valid as against the third person through the mere subsequent assent of the principal.<sup>3</sup> To call subsequent assent in such a case a ratification is clearly a misnomer; for the contemplated contract was, or by the court was assumed to be, fully within the agent's authority, and hence the defect was in the contract itself and not in the agent. No one supposes that a ratification is more efficient than an original authorization, nor that it can change the force given by law to certain forms of language and of signature. The cases cited in *Dodge v. Hopkins*, therefore, do not sustain the decision, but do show clearly that, as between an assumed principal and the third person, the court considered an unauthorized transaction wholly nugatory. Such a conception cannot lead to good results. An argument based upon it either proves too much or proves nothing at all. The logical conclusion ought to be that an entirely new contract is necessary, and that hence there is no

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<sup>1</sup> For ratification is neither a contract nor an estoppel, but a mere election. *Commercial Bank v. Warren*, 15 N. Y. 577 (1857); *Forsyth v. Day*, 46 Me. 176, 194-197 (1853); *Metcalf v. Williams*, 144 Mass. 452, 454 (1887). A possible explanation of *Dodge v. Hopkins* is that the court may have assumed that a ratification requires either a consideration or the elements of an estoppel.

<sup>2</sup> *Townsend v. Corning*, 23 Wend. 435 (1840); *Townsend v. Hubbard*, 4 Hill, 351 (1842).

<sup>3</sup> Nor could it have become valid if the third person had assented to the so-called ratification. It might be that such so-called ratification and such assent could be taken together as making a contract; but that would be a new contract, and would not by relation cause the old transaction to have efficacy.

doctrine of ratification. Yet there is a doctrine of ratification; and transactions which, as between the principal and the third person, were originally not of full validity, because of lack of authority, are the very transactions for which the doctrine of ratification was created, and to which alone it is applicable. Indeed, in the opinion in *Dodge v. Hopkins* it was conceded that a ratification does cause an unauthorized contract, though contemplating mutual promises, to become binding upon the ratifier. This concession, even when supported on the ground that the adverse party by choosing to accept the ratification makes the ratification mutual, seems fatal to the principal doctrine of the case. There is no rule to the effect that the adverse party, in order to profit by a ratification, must promptly assent to it, nor that after ratification and before assent by the adverse party the principal may withdraw, nor even that the adverse party must know of the ratification. Hence it seems that the validity of a ratification as against the ratifier depends upon the ratifier alone. Yet if his ratification makes good the promise originally made in his behalf by the unauthorized agent, it seems to make good at the same instant the counter-promise for which that promise was the consideration. Whether this reasoning be approved or not, it is admitted on all sides that a ratification, if assented to, makes the original contract binding upon both parties as of the time of the original transaction; and this result seems to prove the untruthfulness of the assumption that the original transaction is wholly nugatory and the doubtfulness of the conclusion that a new assent is necessary. The truth seems to be that the original transaction cannot be disregarded entirely; that it is at least efficacious to the extent of supplying evidence of the assent of the third person; that in the absence of withdrawal of that assent a new assent is unnecessary; and that consequently the doctrine of *Dodge v. Hopkins* is unsatisfactory. The sound and useful features of *Dodge v. Hopkins* appear to be the tacit assumptions that a contract, even if made through an unauthorized agent, cannot become binding upon either party in interest unless at some one moment there is actually or theoretically an expression of assent by each, and that the doctrine of relation cannot be applied unless this elementary requirement of the law of Contracts is fulfilled.<sup>1</sup>

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<sup>1</sup> An authority for these tacit assumptions is *Walter v. James*, L. R. 6 Ex. 124 (1871), cited above.



A second theory<sup>1</sup> is that the third person's assent to the original transaction is simply an offer, contemplating ultimate acceptance by the principal, that ratification is such acceptance, and that, if the third person withdraws his assent before ratification, there never is mutual assent. This theory, of course, answers the problem in the negative. There are obvious objections to saying that the third person's share in the original transaction must be treated as simply an offer. If it be simply an offer, and if the only acceptance be ratification, the transaction will become incapable of ratification if the assumed agent does not within a reasonable time communicate the facts to the principal and secure a ratification; but there really is no rule to this effect, and even if the transaction should be concealed from the principal for years, there is no reason why he cannot at last ratify it. An unaccepted offer expires if not accepted within a reasonable time after communication, for the reason that an offerer asks for an acceptance; but the adverse party assenting to the original transaction now being discussed, in so far as the assent is an offer, asks for no acceptance beyond the assumed agent's assent, and upon getting that acceptance the adverse party ceases to look forward to anything but performance. In other words, in the case of a mere offer, the offerer knows there is no contract until acceptance, and if within a reasonable time there is no acceptance, he infers there is no contract, and acts accordingly, and hence there is normally an intention that an offer shall expire within a reasonable time; but a person who makes a contract with an assumed agent, by him supposed to be authorized, conceives himself to have actually entered into a contract, is expecting no further acceptance, but wishes and understands himself to be bound already. Besides, there is no question that when the ratification comes it makes a contract, not as of the date of the ratification, but as of the date of the original apparent mutual assent, and that in this sense, at least, the original transaction cannot be considered as a mere offer. For all these reasons this second theory appears to be objectionable.

A third theory<sup>2</sup> is that the original transaction includes both offer and acceptance, and creates a valid contract, but that the performance of the contract is conditional. The imagined condition may be a provision that the contract is not to be performed if

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<sup>1</sup> Suggested in the editorial note in 5 Am. St. Rep. 109.

<sup>2</sup> Suggested in 5 Law Q. R. 440.

there is no ratification, or that it is not to be performed if, before the assumed principal ratifies, the third person withdraws; and the proposed problem will be answered in the affirmative under the former condition, and in the negative under the latter. A sufficient answer to this theory is that it is contrary to the facts. The assumed agent and the third person contract absolutely and upon the assumption of authority. The assumed agent, if, as is taken for granted in the problem, he is believed to have authority, represents that the contract is subject to no condition as to ratification. The third person believes the representation. Hence arises the right of action against the assumed agent in case the false pretence of authority ultimately causes the third person harm.

A fourth theory, as different from the theory of *Dodge v. Hopkins* as can be imagined, is developed in *Bolton Partners v. Lambert*,<sup>1</sup> a case decided by the English Court of Appeal in 1889. The theory is in effect that by reason of the doctrine of relation the original transaction, though not binding the assumed principal until ratification, does from the beginning bind the third person. The consequence is that the problem is answered in the affirmative. If the maxim to the effect that ratification is equivalent to original authorization be accepted as a full statement of the law, the doctrine of *Bolton Partners v. Lambert* seems to result; and in this sense the doctrine of the case tends to make the law of ratification symmetrical. Yet it has already been pointed out that the maxim is subject to exceptions or explanations, and that by reason of these limitations the fiction of relation is applicable only in so far as justice is not defeated thereby. It seems that in *Bolton Partners v. Lambert* the court laid too much stress upon the maxim,<sup>2</sup> which at most tells what is the effect of ratification when

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<sup>1</sup> 41 Ch. D. 295. Approved by the Court of Appeal in *In re Portuguese Consolidated Copper Mines*, 45 Ch. D. 16 (1890), where the point was really unnecessary. In that case North, J., sitting in the Chancery Division, criticised *Bolton Partners v. Lambert*; and in the Court of Appeal, Lindley, L. J., said: "Then it is said that the fact that the contract was made by persons without authority makes it void. . . . That was the very point urged in *Bolton Partners v. Lambert*; but the court repudiated it, and said: 'No, it is voidable at the option of the principal; he can avoid it if he likes; he can elect to stand upon it if he likes.'" This explanation of the case resembles the third theory discussed in the text; but it is not the explanation given in the case itself, as appears in the next note. *Bolton Partners v. Lambert* is criticised in 5 Law Q. Rev. 440, and in *Fry on Specific Performance* (3d ed.), 711-713.

<sup>2</sup> Thus Cotton, L. J., said: "The rule as to ratification by a principal of acts done by an assumed agent is that the ratification is thrown back to the date of the act done, and that the agent is put in the same position as if he had authority to do the act



it is conceded that ratification does have some effect, and too little stress upon the rules indicating when ratification is, and when it is not, admissible.<sup>1</sup> When the result of permitting ratification is, as it was in *Bolton Partners v. Lambert*, to allow the unbound principal time to profit by developments in the market, while the adverse party is bound *ab initio* and has no power to withdraw from the unexpectedly unequal transaction, the result is so unjust as to make this an unfit place for applying the doctrine of relation.

at the time the act was done by him. . . . I think the proper view is that the acceptance by Scratchley did constitute a contract, subject to its being shown that Scratchley had authority to bind the company. If that were not shown, there would be no contract on the part of the company; but when, and as soon as authority was given to Scratchley to bind the company, the authority was thrown back to the time when the act was done by Scratchley, and prevented the defendant withdrawing his offer, because it was then no longer an offer but a binding contract." And Lindley, L. J., said: "It is not a question whether a mere offer can be withdrawn, but the question is whether, when there has been in fact an acceptance which is in form an acceptance by a principal through his agent, though the person assuming to act as agent has not then been so authorized, there can or can not be a withdrawal of the offer before the ratification of the acceptance. I can find no authority in the books to warrant the contention that an offer made, and in fact accepted by a principal through an agent or otherwise, can be withdrawn. The true view, on the contrary, appears to be that the doctrine as to the retrospective action of ratification is applicable. If we look at Mr. Brice's argument closely it will be found to turn on this,—that the acceptance was a nullity, and unless we are prepared to say that the acceptance of the agent was absolutely a nullity, Mr. Brice's contention cannot be accepted. . . . I see no reason to take this case out of the application of the general principle as to ratification." And Lopes, L. J., said: "It is said that there was no contract which could be ratified, because Scratchley at the time he accepted the defendant's offer had no authority to act for the plaintiffs. Directly Scratchley on behalf and in the name of the plaintiffs accepted the defendant's offer, I think there was a contract made by Scratchley assuming to act for the plaintiffs, subject to proof by the plaintiffs that Scratchley had that authority. The plaintiffs subsequently did adopt the contract, and thereby recognized the authority of their agent Scratchley. Directly they did so the doctrine of ratification applied and gave the same effect to the contract made by Scratchley as it would have had if Scratchley had been clothed with a precedent authority to make it. If Scratchley had acted under a precedent authority the withdrawal of the offer by the defendant would have been inoperative, and it is equally inoperative where the plaintiffs have ratified and adopted the contract of the agent. To hold otherwise would be to deprive the doctrine of ratification of its retrospective effect."

The criticism made by North, J., referred to in the preceding note, was: "It comes to this, that if an offer to purchase is made to a person who professes to be the agent for a principal, but who has no authority to accept it, the person making the offer will be in a worse position as regards withdrawing it than if it had been made to the principal; and the acceptance of the unauthorized agent in the mean time will bind the purchaser to his principal, but will not in any way bind the principal to the purchaser."

<sup>1</sup> It seems, for example, that too little attention was given to the doctrine of *Walter v. James*, L. R. 6 Ex. 124 (1871), cited in this article as an authority for the third rule supplementing the maxim as to ratification.

*Bolton Partners v. Lambert* has performed a good service by emphasizing the fact that the original transaction is not a mere nullity and that neither the offer nor the acceptance contained in it can be utterly disregarded; but the case seems to have gone much too far; for in reality the contract first becomes binding when the ratification takes effect, and though thereupon the doctrine of relation normally applies, the appeal cannot be made to the doctrine of relation without first meeting the question whether at that time the parties expressly or impliedly assent, and whether under the circumstances ratification and relation will lead to absurd or unjust results. This is one of the places where the law consciously takes cognizance of convenience and justice, and does not permit its usually convenient fictions to be carried too far. Therefore it is unnecessary to dwell upon the fact that *Bolton Partners v. Lambert* appears to depart from the requirements of the law of Contracts as to mutual assent much more widely than the peculiarities of the law of Agency require; and it is enough to point out that after the third person has clearly withdrawn his original assent, it is an obvious and unnecessary hardship to hold him bound, in expectation of possible ratification, to a still unbound principal. Nor does it seem an adequate answer to say that, in case the unbound principal eventually learns of the contract and refuses to ratify it, the third person may have a remedy against the assumed agent.

Doubtless other objections can be urged against the theories that have been discussed; and doubtless, as was admitted at the outset, it is impossible to suggest a theory that will be free from objection. Yet the person who adversely criticises past theories is under a duty to attempt to present a theory that shall avoid some of the objections pointed out by him. Hence, though with great diffidence, a fifth theory is suggested, namely, that the original transaction does not finally bind either the principal or the adverse party; that there can be no contract unless and until both parties actually or impliedly express simultaneous assent; that the assent expressed by the adverse party at the time of the original transaction must be considered as continuing until withdrawn; that the only effect of the assent expressed by the unauthorized agent is to meet the expressed assent of the adverse party with an expression which may ultimately be adopted by the assumed principal, and which, meanwhile, prevents the expressed assent of the adverse party from expiring by lapse; that before ratification the expressed



assent of the adverse party may be withdrawn; that the withdrawal must be communicated either to the unauthorized agent or to the assumed principal; that ratification cannot be effective unless it precedes such communication; and that, subject to these limitations and to the general rule forbidding the doctrine of relation to be so applied as to work injustice, ratification relates back and causes the original transaction to be efficient as of its original date.

*Eugene Wambaugh.*

## THE RISK OF LOSS AFTER AN EXECUTORY CONTRACT OF SALE IN THE CIVIL LAW.

IN the Institutes of Justinian it is laid down:<sup>1</sup> "As soon as the contract of purchase and sale is made, which is, if the transaction is without writing, when the price is agreed, the risk of the thing sold immediately falls upon the buyer, although it has not yet been delivered to him. Thus, if the slave dies or is injured in any part of his body, or the whole or any part of the house is burned, or the whole or any part of the land is carried away by flood or is diminished or injured by an inundation or by a tempest which overthrows the trees, it is the loss of the buyer, who must pay the price though he does not receive the thing," and though, it may be added, delivery was necessary according to the Roman law for the transfer of title, as it is generally in the modern civil law.

This view seems to have been little questioned by the Roman writers, though Africanus says that if the treasury seizes upon an estate which the owner has agreed to sell but has not delivered, the owner, though not liable for damages, must restore the price.<sup>2</sup> This text led Cujacius to maintain that by the Roman Law the risk remained with the seller until delivery, but the text was reconciled by other writers as depending upon the particular facts of the case. Thus Voet says:<sup>3</sup>—

"There the question was as to a farm, which, though captured from the enemy, for the time had been left to its former owner, but afterwards had been confiscated owing to urgent necessity or public utility, as it appears may be done. Since, therefore, the seller could not prevent this confiscation, it would have been unjust for the buyer to be bound, because the seller ought to have warned an ignorant buyer that the land was in a position where it might be confiscated at the will of the Prince; and if he did not do this, he is held to restitution of the price, as if on account of some latent defect of the thing."

<sup>1</sup> Lib. iii. Tit. xxiii. 3. The rule seems to be of great antiquity, and Dr. Franz Hofmann endeavors to show that it is of Greek origin. *Periculum beim Kauf* (Vienna, 1870), pp. 169-188.

<sup>2</sup> Dig. Lib. 19 (locati conducti), 2, 33, quoted by Pothier, *Contrat de Vente*, § 308.

<sup>3</sup> *Compendium Juris*, Lib. 18 *Pandectarum*, Tit. vi. De Periculo, 1.



In order to transfer the risk to the buyer, it was necessary that there should be *emptio perfecta*. The obligation of the parties to go forward might be complete, yet the sale might not be perfect. To make a perfect sale it was necessary for the bargain to be unconditional, to relate to specific goods, and for the price to be certain.<sup>1</sup> If a sale was subject to a suspensive (or precedent) condition, and the subject matter was destroyed before fulfilment of the condition, the loss fell on the seller, since the obligation could never become complete; but if the injury to the subject matter did not destroy it or change its identity, the loss fell on the buyer, if the condition was fulfilled, for the fulfilment was held to relate back to the time when the agreement was concluded. If a resolatory (subsequent) condition was attached to a bargain, the risk of destruction nevertheless passed immediately, but the risk of injury not amounting to destruction did not necessarily pass for such injury, would not prevent the rescission of the contract by the happening of the condition; and if the condition were dependent on the will of the buyer, he would naturally exercise his right.<sup>2</sup> A sale was also imperfect if the amount of the price was not exactly determined, or if the goods were not exactly defined. Thus, in sales by count, weight, or measure, the risk did not pass to the buyer till the goods were counted, weighed, or measured. This was so where a definite quantity or proportion of a specified mass was sold at a price to be determined by calculation when the goods should be counted, weighed, or measured;<sup>3</sup> and it has even been held that though the whole of such a mass were purchased, the transaction should be regarded in the same way,<sup>4</sup> but the contrary view certainly seems more sensible.<sup>5</sup> So if a fixed proportion of a specified mass were

<sup>1</sup> "Si id quod venderet appareat quid quale quantum sit, sit et pretium, et pure venit, perfecta est emptio." Dig. 18, 6, 8. Pothier, *Contrat de Vente*, § 309; Moyle, *Contract of Sale in the Civil Law*, 77.

<sup>2</sup> Moyle, *Contract of Sale*, 78-82; Pothier, *Contrat de Vente*, §§ 311-313; Voet, *Compendium Juris*, Lib. 18 *Pandectarum*, Tit. vi. 4. Compare *Code Civil*, § 1182.

<sup>3</sup> Moyle, *Contract of Sale*, 84, 85; Pothier, *Contrat de Vente*, § 309; *Code Civil*, § 1585.

<sup>4</sup> Moyle, *Contract of Sale*, 84, citing Demante, *Cours Analytique de Code Civil*, vii. p. 10; Pothier, *Contrat de Vente*, § 309. So in *Peterkin v. Martin*, 30 La. An. 894, 896, it is laid down: "There can be no sale in lump except for a lumping price." This is because by the civil law to make a perfect sale it is necessary that the price as well as the goods should be ascertained.

<sup>5</sup> Aubry & Rau, *Cours de Droit Civil Français*, 4th ed. iv. § 349, p. 341, citing Duvergier, i. 90, Dijon, 13 décembre, 1867, Sir., 68, 2, 311. As delivery is no longer necessary in France for the transfer of title, the title in the case supposed would in that country pass to the buyer; and if the risk remains with the seller, the curious case is

purchased, that should also be regarded as a sale *per aversionem*, — that is, a sale of a specified thing for a lump sum.<sup>1</sup> After the risk had passed to the buyer, the seller before delivery was liable for wilful default (*dolus*), and also negligence (*culpa*), whether gross or slight, unless the buyer were in default (*mora*) in receiving delivery, in which case the seller was thereafter only responsible for wilful default.<sup>2</sup> If the seller were in default in making delivery, the property was thereafter at his risk.<sup>3</sup>

The reason uniformly given by the older writers in support of the doctrine of the Roman law, that the risk passes as soon as there is *emptio perfecta*, though the title has not passed, is thus expressed by Noodt: <sup>4</sup> "The buyer, as soon as the bargain is made, is a creditor of the thing sold. The seller, on the other hand, is a debtor. By the natural destruction of it, the debtor of a specific thing is freed from his debt."<sup>5</sup> This argument is, of course, sufficiently conclusive to prove that the seller is freed from liability, but it does not prove that the buyer is liable. That it is assumed to have this effect would naturally induce the belief that the Roman law did not have the principle of the English law, that if one party to a contract of mutual obligation is excused from performing by the impossibility of performance, the other party is likewise excused; or, as it may be put more tersely, impossibility excuses breach of a promise, but not breach of a condition, whether express or implied. Certainly writers on the civil law prior to this century did not so understand the law,<sup>6</sup> or the insufficiency of their argu-

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presented of a seller retaining the risk after he has parted with title and perhaps possession. But such, it seems, is the law of Louisiana. It was so held in *Shuff v. Morgan*, 9 Martin, 592. In *Larue v. Rugely*, 10 La. An. 242, however, the court expressly leave open the question whether transfer of possession as well as title would transfer the risk. See also *Goodwyn v. Pritchard*, 10 La. An. 249; *Peterkin v. Martin*, 30 La. An. 894.

<sup>1</sup> Moyle, *Contract of Sale*, 86.

<sup>2</sup> Voet, *Compendium Juris*, Lib. 18 *Pandectarum*, Tit. vi. 2.

<sup>3</sup> *Ibid.* Tit. vi. 3. See also Moyle, p. 87.

<sup>4</sup> Lib. xviii. Tit. vi.

<sup>5</sup> See also Voet, Lib. xviii. Tit. vi.; Sandars' *Justinian*, Hammond's ed., p. 446; Pothier, *Contrat de Vente*, § 308; C. G. Wächter, *Archiv. f. civil Pr.*, xv. 97 (1832). See also, Moyle, p. 90.

<sup>6</sup> Thus Pothier, *Contrat de Vente*, § 308, states that though Barbeyrac and Puffendorf object "that the buyer's obligation to pay the price is dependent upon the condition that the thing sold shall be delivered to him, I deny the proposition. The buyer is under an obligation to pay the price, not upon condition that the seller shall give him the thing, but rather upon the condition that the seller is on his part obliged to cause him to have the thing; it is sufficient, therefore, if the seller is legally subject to such obligation, and does not fail in its performance, in order that the obligation of the buyer may have a cause and subsist."



ments as to risk would have been apparent. Nevertheless, there is a text in the Digest which covers the case.<sup>1</sup> At the present day the general rule in the civil law is almost universally recognized to be the same as in the English law.<sup>2</sup>

It only remained, therefore, for the civilians to find another and better reason, or to change their rule. The subject has been a popular one with legal writers on the Continent of Europe, especially in Germany; and many and various have been the reasons, theoretical and practical, suggested. It is not necessary to examine all of them,<sup>3</sup> but three lines of reasoning seem entitled to consideration, —

I. The buyer is entitled to the *commodum rei*, and the *periculum rei* should always go to the same party. But there is no *commodum rei* that can be classed with the risk of destruction. Changes in the pecuniary value of the subject matter of a bargain have of course no effect upon it. But if a case can be supposed of an accidental change in the subject matter of a contract of sale, so that it is no longer substantially the same thing, it is not certain that the seller would be bound to perform.<sup>4</sup> As this argument rests on an assumption which, though it cannot be disproved, cannot be proved, it does not advance the discussion.

<sup>1</sup> Dig. 19, 1, 50. "Bona fides non patitur, ut, cum emptor alicujus legis beneficio pecuniam rei venditae debere desisset antequam res ei tradatur, venditor tradere compelleretur et re sua careret."

<sup>2</sup> Windscheid, Lehrbuch des Pandektenrechts, § 321, 3; Hofmann, Periculum beim Kauf, pp. 8, 9. Both writers cite a number of other authorities. Some authorities, however, still maintain that in order to make out the *exceptio non adimpleti contractus* it is necessary that the plaintiff shall be in default in the performance of his obligation, — not simply have failed to perform it under circumstances making his failure excusable. A few writers hold that a bilateral contract consists of two wholly independent promises. See citations above.

<sup>3</sup> As an illustration of the fertility of the Teutonic intellect when in search of a reason, the suggestion of a writer, not inaptly named Goose, may be mentioned. He says, "even if the buyer were not required to pay the price, he would be injured by the calamity, for the thing purchased was of more value to him than the money; the seller also, would not be freed from loss, for the money was worth more to him than the thing. If the buyer is required to pay the price, he only suffers loss. A contrary view would be very like the justice of St. Crispin, only worse. It injures both, and indemnifies neither." Jahrb. f. Dogm., ix. § 203. So able a writer as Ihering puts forward as the reason of the rule the theory that failure to make an immediate delivery and transfer of title is generally due to the wrongful delay of the buyer, and that to prevent controversy, the law assumes this to be always the case. Jahrb. f. Dogm. iii. 463-465.

<sup>4</sup> "It is said, 'the buyer is not unfairly treated, the *commodum* also belongs to him.' This is only saying that the *commodum rei* and the *periculum rei* must always fall to the same party, but to which one?" Hofmann, p. 33.

2. Immediately after the contract, the seller can no longer deal with the subject matter of it freely for his own benefit. His hands are tied. If an accident befalls the thing, and the loss is thrown upon the seller, he has incurred a loss because of holding the thing for the seller's benefit instead of disposing of it otherwise. But it must be observed that every bilateral contract, if the parties respect their promises, involves the consequence that neither party is as free as he was before; and in a contract of sale the loss of freedom on the part of the buyer is just as real, and just as much for the benefit of the other party, as is the seller's sacrifice. True, the seller's obligation relates to a specific thing; but, generally speaking, the only result of a failure by the seller to have the thing ready for delivery is liability in damages to the buyer, and the latter suffers the same consequence if he has not the price ready at the appointed time.

3. Windscheid's explanation<sup>1</sup> is that the contract of sale itself is from its very nature in effect an alienation of the thing sold. A contract of sale, he says, is an immediate declaration of surrender of the owner's rights in a thing (*Entäusserungserklärung*). "It has for its content that the thing sold is given; it is not that an obligation is undertaken to give it. An obligation on the part of the seller first arises when the actual state of affairs does not correspond to the declaration." It is another and somewhat less carefully analyzed way of saying the same thing, to say that when a contract of sale is entered into, an immediate completion is ordinarily expected and a delay is accidental. This line of argument in a sense includes also the reason given in the preceding paragraph. It may be doubted whether the parties to a contract to sell at a future day, look at the matter in this way; and it is not unlikely that Windscheid was led to adopt his view in order to furnish an explanation of the rule of the Roman law as to risk.

The reasons brought forward in support of the doctrine of the Roman law seem generally to have been thought inadequate by European legislators. In France the risk of loss now remains with the seller until the title passes;<sup>2</sup> in Prus-

<sup>1</sup> Lehrbuch, § 321, 3. A similar theory is expressed in Austin on Jurisprudence, 4th ed. p. 1001.

<sup>2</sup> This change in the French law has been effected by putting back the time of the transfer of title to the time of the contract. Code Civ., art. 711, "La propriété des biens s'acquiert . . . par l'effet des obligations." Art. 1138. "L'obligation de livrer la chose est parfaite par le seul consentement des parties contractantes. Elle rend le créancier propriétaire et met la chose à ses risques dès l'instant où elle a dû être livrée,



sia<sup>1</sup> and Austria<sup>2</sup> until delivery, which is also generally the moment when the title passes.<sup>3</sup>

If the risk remain with the seller until delivery or transfer of title, few subsidiary questions can arise; but if the general doctrine of the Roman law is followed, endless arguments are still open as to the correctness of the conclusions of that law in the case of conditional contracts.<sup>4</sup> A favorite matter of dispute also is the case of successive agreements by a seller with two persons to sell each the same thing. Every possible view has its champions, that the seller can recover the price from the first buyer only, from the second buyer only, from neither buyer because the seller can prove against neither that the thing was being held for him, that the decision depends on whether the second sale was made in good faith,<sup>5</sup> and finally Ihering maintains that whether the seller has acted in good faith or not, he may recover the price from either buyer he wishes.<sup>6</sup> This seems almost a *reductio ad absurdum* of the Roman theory.

No difference was made by the Roman law, or seems to be made by the modern civil law, on this subject, between movable and immovable property. By the Roman law a contract of sale before actual transfer of title, gave the purchaser a purely personal right against the seller; and if the contract was not performed, the buyer could only be compelled to pay damages. He could not get the thing itself.<sup>7</sup> If the seller, in violation of his contract, sold and delivered the thing to a third person, the latter acquired title, and

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encore que la tradition n'en ait point été faite." The French law is, therefore, now quite similar to the English; and the rule of French law that *en fait de meubles possession vaut titre* bears some analogy to the rule generally prevailing in this country, that as regards an innocent third person, delivery is necessary, though unnecessary so far as the buyer and seller are concerned.

<sup>1</sup> Gesetzbuch, § 100, I. Teil, XI. Titel.; Hofmann, p. 46.

<sup>2</sup> Gesetzbuch, §§ 1048-1050, 1064; Hofmann, p. 52. If a time for delivery is fixed by the contract. After that time the risk is transferred to the buyer.

<sup>3</sup> The case may arise, certainly in the case of real estate, where delivery is made but title has not passed, because a necessary formality has not been complied with. In such a case it is held, in Prussia at least, that the risk is upon the buyer. *Entscheidungen des Rechtsgerichts, Civilsachen*, vol. 7, p. 241.

<sup>4</sup> See *ante*, p. 73.

<sup>5</sup> This case is not so improbable as appears at first sight. Thus an owner of property might contract to sell it after an authorized agent had made a similar contract.

<sup>6</sup> For the learning on this subject see Hofmann, pp. 137-153; Martinius, *Der Mehrfache Kauf* (Halle, 1873); Windscheid, *Lehrbuch*, § 390, clause 3; Ihering, *Jahrb. f. Dogm.* iii. 474.

<sup>7</sup> This is expressed by the maxim *Nemo Potest præcise cogi ad factum*. Pothier, *Obligations*, Part i. ch. ii. art. 2, § 2; Fry, *Spec. Perf.*, § 6; Holland, *Jurisprudence*, 6th ed. pp. 283, 284.



even though he knew of the prior contract, was apparently under no liability.<sup>1</sup> In the modern civil law the remedy of specific performance seems to be generally adopted;<sup>2</sup> and, since the adoption of a system of registering deeds and contracts, relating to land,

<sup>1</sup> This is still the law to a great extent. It is true that Pothier says of the original purchaser in such a case (*Contrat de Vente*, § 320), "He cannot reclaim the thing against the second buyer, who purchases it in good faith, *inscius prioris venditionis*." Pothier, however, does not make the positive statement that the thing might be reclaimed from one who purchased the thing in bad faith. On the other hand, in Aubry & Rau, *Cours de Droit Civil Français*, 4th ed., ii. p. 55, in discussing the doctrine of modern French law, that a second purchaser, in good faith, to whom the thing is delivered acquires a superior right to the first purchaser, to whom no delivery was made, though the latter has title, the authors say: "D'ailleurs il ne faut pas perdre de vue que la préférence n'est accordée au second acquéreur qu'autant qu'il est de bonne foi; et cette condition nese comprendrait pas en principe, si la propriété des meubles corporels ne vait se transférer à l'égard des tiers que par la tradition." That is, the fact that the original purchaser has a remedy against a second purchaser with notice necessarily implies that the original purchaser had title as distinguished from a contractual right. See also *Knox v. Payne*, 13 La. An. 361.

In Germany, according to the old common law, the purchaser of real estate was protected more fully than by the English law. Stobbe (*Handbuch des Deutsches Privatrecht*, § 175) says: "If the owner of an estate engages to transfer it to another, and afterwards conveys it to a third person, according to the law of the middle ages, the first appears to have been preferred to the second purchaser, and to have had an action against him for surrender of the estate, in case he had not acquired through lapse of time lawful seisin. To a certain extent this principle belongs to later law also, but with this limitation that the second purchaser is only liable in case of bad faith." Mr. Julian W. Mack of Chicago, whose studies in Germany have made him fully acquainted with the matter, writes me that the new draft civil code, intended to apply to the whole German Empire, but not yet adopted, "is to retain as far as possible Roman theories, modified only by such regulations as result from the 'Grundbuch' (land registration). At least in the original edition of the code, the contract was not recognized as having any binding effect on the property, either real or personal, even as against the purchaser with notice."

Further, creditors of a seller by the Roman law might seize the thing sold at any time before delivery, even though the price had been paid. Pothier, *Contrat de Vente*, § 321. This was the law of Scotland until 19 & 20 Vict. c. 60, §§ 1 & 2. See Moyle, *Contract of Sale*, 135; Bell, *Principles of the Law of Scotland*, § 86.

<sup>2</sup> A learned reviewer of the third edition of Fry on Specific Performance, questioning an opinion expressed in that work, that specific enforcement of contracts probably has a more extensive application in England than on the Continent of Europe, says (8 *Law Quarterly Review*, 251): "If we had to express the difference between English and Continental law in this respect in a few words, we should say that in England specific performance is granted where damages are not an adequate remedy, whilst on the Continent damages are awarded when specific performance is impossible, and also that the means of enforcement are more varied on the Continent than in England." This statement seems borne out by quotations from French and German authorities. Demolombe, *Traité des Contrats*, 2d ed. vol. i. p. 486; Dernburg, *Preussisches Privatrecht*, 3d ed. vol. i. p. 276; Forster-Eccius, *Preussisches Privatrecht*, 4th ed. vol. i. pp. 551, 899; German Code of Civil Procedure, §§ 769-779.

one who has entered into a contract for the purchase of real estate may, in some jurisdictions, by recording his contract, acquire a right against any one who thereafter takes title.<sup>1</sup> These changes in the law do not seem, however, to have been considered by writers as making any difference in the risk after a contract of sale. Registration laws and specific performance are not referred to in that connection.

It is obvious that the extent of the right to the thing itself which a buyer acquires immediately on the completion of a contract might well be a consideration of great importance. If the buyer acquires by a recorded contract for the purchase of an estate an absolute right against the world to have that property upon paying the price, there is given to the argument of Windscheid quoted above, that a sale is itself an alienation of the property, a force which it does not otherwise possess. It has been because of the control which the buyer of real estate acquires immediately upon the formation of a contract of sale that the English court of chancery and the courts of some of the United States have held that the contract makes the buyer at once the owner in equity, and the loser by the injury or destruction of the property. But this reasoning seems peculiar to English and American law.

*Samuel Williston.*

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<sup>1</sup> In France, in 1855, a law was passed having the same general effect as the registration laws generally in force in this country. See Aubry & Rau, *Cours de Droit Civil*, 4th ed. ii. p. 56 et seq., 286 et seq. Under this law contracts to sell real estate as well as conveyances may be recorded; and consequently, if recorded, insure the purchaser a right against any one who in fraud of the contract thereafter obtains a conveyance. In Germany registration laws are now generally in force. In some States registration is a necessary element in the transfer of title; in other States it has no more importance than in this country. In Prussia title passes by registration, even though the buyer knows of a previous contract; and so in some other States. Stobbe, *Handbuch des Deutschen Privatrecht*, § 95. By the draft civil code, Mr. Mack informs me, a contract is not recognized as a document to be recorded.

## RECOVERY FOR CONSEQUENCES OF AN ACT.

ONE of the surprising facts in the history of our law is the unsettled state of its doctrine with respect to recovery for consequences. This is a fundamental point, both of civil and of criminal liability; volumes have been written about it in the last fifty years, yet we are apparently no nearer an accepted doctrine than we were three centuries ago. Four or five rules have been proposed, discussed, and found inadequate; all of them, in difficult cases, fail even to guide a jury, and no one has prevailed over the others.

The fruitlessness of the discussion seems to indicate one of two things. Either recovery for consequences depends entirely upon a question of fact, must in every case be left to a jury, and can never profitably be determined by the law or predicted by a lawyer; or else, if there is an underlying principle of law, we have not yet sought it in the right way, and must retrace our steps and try again from the beginning. The former opinion has been expressed,<sup>1</sup> but it has found few advocates, and its adoption must surely be a last resort. It remains to start afresh. I do not propose in this article to formulate and attempt to support another alleged rule of law upon the subject, but to point out a new and what seems the right way of starting in order to reach a satisfactory goal.

The false direction first came, I think, from a misconception of the problem. The attempt made was to connect defendant with the result complained of by means of a train of events through which it was thought the active force set in motion by the defendant could be traced. If, according to one form of statement, the result was not a remote consequence, or according to another form, it was the natural or probable consequence of what defendant did, liability for the result was thought to be established. The connection sought was one between the final result and defendant's original act. In seeking this connection the courts (at least in this century) professed to be guided by Lord Bacon's first maxim, "*Causa proxima non remota spectatur.*"

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<sup>1</sup> For instance, by a majority of the court (Ladd, J., vigorously dissenting) in *Gilman v. Noyes*, 57 N. H. 627, Smith Cas. on Torts, 18.



A true reading of this maxim, in connection with the examples given by Bacon to support it, indicates quite the contrary course. If the maxim means anything, it is this: that in looking for the cause of a loss, in order to affix liability for it, one cannot go behind the last cause. Only one relation of cause and effect can be shown, — that between the final cause and its immediate effect. Liability for result and responsibility for final cause are inseparable: given either, the other must exist; one wanting, the other cannot exist. To be liable for a loss, the responsibility of defendant for its final cause must be shown, and that alone. So understood, the maxim would be recognized as axiomatic if it had not been obscured by the mistaken discussion.<sup>1</sup>

Assuming the truth of the maxim, two results follow: first, that the direct cause of a result complained of must first be found, when it will appear as a combination of circumstances, of which the loss is the resultant; and the defendant's responsibility for this combination of circumstances must then be directly established, in accordance with some principle which it is the whole object of our study to determine.

It may be asked, What do we gain by this restatement of our problem, since we still have to seek for a principle which seems very much the same as that for which we have always been seeking? This, at any rate, that if the problem is correctly stated, the reasons for its existence and its solution are apparent. But we also get nearer to the defendant when we seek to connect him with the cause instead of the result, and it will probably appear that we thus eliminate a large part of the difficulty; and we do away at once with the consideration of this as a separate class of cases. We treat defendant's responsibility in the same way, wherever the question arises; whether he has set in motion a natural force, an animal, an agent, or an independent person. Let me now formulate the ideas I have put forward and explain my meaning by examples.

1. If one is legally responsible for an act, he is chargeable with the direct results of the act, however surprising.<sup>2</sup>

The simplest case is that of physical force. If I wrongfully bring my hand into contact with another's person or property, I

<sup>1</sup> It is sufficiently clear that if defendant is liable for the result, he must be responsible for the final cause. The converse will be made evident, I hope, by what follows.

<sup>2</sup> This principle was perhaps first pointed out in the brilliant if not altogether sound opinion of Wardlaw, J., in *Harrison v. Berkeley*, 1 Strob. L. 525, Smith

am responsible for whatever results from the wrongful contact. If by a mere unlawful touch I cause death or severe bodily harm to another (by reason, for example, of his delicate state of health), I am liable for the result either civilly<sup>1</sup> or criminally.<sup>2</sup> If I wrongfully cause A to put ketchup in a cask which has contained turpentine (though I do not know and have no reason to suspect that fact), I am responsible for the harm done to the ketchup by the combination.<sup>3</sup> If I throw into the ocean a box belonging to A, which I have every reason to suppose empty, but there is hidden in it a purse of gold which is lost, I am liable for the loss.<sup>4</sup>

2. We mean by an act, in this use of the word, the whole combination of circumstances, the resultant of which is the harm complained of.

In all cases of personal injury or direct injury to property, the act is the physical contact between the person or property injured and the outside force. It is immaterial which element of the combination is the active one. My act is the same, whether I thrust a sharp stick into A, or fix the stick, and cause A to run upon it;<sup>5</sup> whether I pour water over him, or cause him to jump into a river;<sup>6</sup> whether I pack him in ice and salt, or cause him to be exposed to the freezing air;<sup>7</sup> whether I throw him upon a pile of bricks, or by removing a staging cause a load of bricks to fall upon him.<sup>8</sup> My act in these cases is not fastening the stick, inducing the man to jump, turning him out of doors, or removing the staging; it is bringing into contact with the man's body the stick, water, cold air, and bricks respectively. If I so negligently manage a vessel of which I am master as to run down and sink another vessel and drown a passenger in it, my act of injury is not the mismanagement of my vessel, but the fatal contact between the passenger and the ocean. My negligence is important only in determining whether I am responsible for that contact.<sup>9</sup>

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<sup>1</sup> *Tice v. Munn*, 94 N. Y. 621; *Brown v. C. M. & S. P. Ry.*, 54 Wis. 342; 1 Sedg. Dam. § 112.

<sup>2</sup> *State v. O'Brien*, 81 Ia. 88, Beale Cas. Crim. L. 433.

<sup>3</sup> *Cunnington v. Great Northern Ry.*, 49 L. T. Rep. 392.

<sup>4</sup> *Eten v. Luyster*, 60 N. Y. 252, Smith Cas. Torts, 55.

<sup>5</sup> See *Reg. v. Martin*, 8 Q. B. D. 54.

<sup>6</sup> See *Reg. v. Pitts, C. & Marsh.* 284.

<sup>7</sup> See *Hendrickson v. Com.*, 85 Ky. 281, Beale Cas. Crim. L. 430.

<sup>8</sup> See *Reg. v. Hughes*, 7 Cox C. C. 301, 26 L. J. M. C. 202.

<sup>9</sup> See a confusion on this point in the minds of some of the court in *Reg. v. Keyn*, 2 Ex. D. 63, 66, 150, 232; Beale Cas. Crim. L. 897, 915.



But usually the act of injury is more difficult to determine. If the complaint is, for instance, that defendant by personally injuring plaintiff caused him to lose the benefit of a contract he expected to make, this loss of contract is a resultant of two forces, — willingness of A to contract with B, and absence of B. The act of injury is defendant's only if he is responsible for this combination of circumstances; his connection or want of connection with one factor is immaterial. If the complaint is for loss of a contract for the resale of an article at an advanced price, because of defendant's breach of contract to furnish the article, the factors of the combination which caused the loss seem to be the existence of a contract for resale at an advanced price, and inability of the present plaintiff to perform it; the latter factor being composed of two elements, — non-delivery of the goods by defendant, and inability to get them elsewhere. If defendant is to pay damages for the loss, he must be shown to be legally responsible for this combination.<sup>1</sup> If the complaint is of loss of use of a mill because defendant, a carrier, delayed transportation of a piece of machinery, the act of injury is a combination of intention to run the mill, inability to run it without such a piece of machinery, absence of the piece, and inability to get another like it. Defendant must be responsible for the combination of all these circumstances if he is to be made liable for the loss of use.<sup>2</sup>

3. In examining the responsibility for a given result, we must first determine the legal responsibility for the combination which directly led to the result.<sup>3</sup> If responsibility for this combination is fixed upon a defendant, he is liable for the result which follows, however surprising, and however far removed from what was in the defendant's mind at the time the force was set in motion by him.

Defendant rescued one who was imprisoned in a civil suit; he is liable for the amount of the creditor's claim, no matter what it was.<sup>4</sup> Defendant caused water to pour into plaintiff's mine; he is respon-

<sup>1</sup> See *Grébert-Borgnis v. Nugent*, 15 Q. B. Div. 85; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473; *Horne v. Midland Ry.*, L. R. 7 C. P. 583, 8 C. P. 131; *Booth v. Spuyten-Duyvil R. M. Co.*, 60 N. Y. 487; *McHose v. Fulmer*, 73 Pa. 363.

<sup>2</sup> See *Hadley v. Baxendale*, 9 Ex. 341, 23 L. J. Ex. 179; *N. Y. & C. Mining Co. v. Fraser*, 130 U. S. 611.

<sup>3</sup> Often called, in scholastic language, *causa proxima* or *causa causans*. I have called it the act of injury.

<sup>4</sup> *Kent v. Kelway*, Lane, 70.



sible for the damage, though he did not know that the place into which the water flowed was a mine.<sup>1</sup> Defendant threw a stone at deceased; the stone unexpectedly hit deceased on the head, and by a singular chance killed him. Defendant is guilty of manslaughter.<sup>2</sup> A pregnant woman was put off a train at the wrong place; she was forced to walk three miles, and the result was a miscarriage. The act of injury consisted in placing the woman where she must walk, and the railroad company being responsible for that is liable for the direct though unexpected result.<sup>3</sup> A railroad train was negligently stopped on a trestle, and the passenger allowed to alight under the supposition that the train had stopped at his station. He fell through the trestle, and suffered an injury which so weakened him that he died of a slight disease contracted before his recovery from the injury. The railroad company, being legally responsible for the combination of injury and disease, is liable for the unusual result.<sup>4</sup>

We see, then, how liability for the result follows from responsibility for its proximate cause. It remains necessary to establish a connection between defendant and the act of injury; but this is to be done upon general grounds of liability. Professor Wigmore has lately suggested certain principles upon which liability for a tort is to be determined.<sup>5</sup> The same principles determine criminal responsibility, and I see no reason to assume that they are not also sufficient to determine the estimation of damages. Let us then see what will result from an application of these principles to our problem.

The defendant's act, in the first instance, consisted in setting some force in motion; and we are to hold him responsible for the act of injury on the ground that this force is a factor of the act. We are to show, then, in the first place, that the act may properly be called defendant's act because of this force which he set in motion; and that being done, we are to show that the defendant is to be held legally responsible for his act.

4. One at least of the factors of the act of injury must in a fair sense be due to the defendant. If the force he set in motion has become, so to speak, merged in the general forces which surround

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<sup>1</sup> *Rylands v. Fletcher*, L. R. 3 H. L. 330, Smith Cas. Torts, 316.

<sup>2</sup> See *Holly v. State*, 10 Humph. 141.

<sup>3</sup> *Brown v. M. & S. P. Ry.*, 54 Wis. 342.

<sup>4</sup> *Terre Haute & I. R. R. v. Buck*, 96 Ind. 346.

<sup>5</sup> 8 HARVARD LAW REVIEW, 377.

us, or in the language of Bishop<sup>1</sup> has "exhausted itself" like a spent cartridge, it can be followed no further. Any later combination of circumstances to which it may contribute in some degree is too remote from the defendant to be chargeable to him.<sup>2</sup>

Thus where A gave to B (an innocent party) poison to be administered to C, and B put the poison on a shelf in C's sick-room, where D found it and gave it to C, A is properly chargeable with the administration of it to C. But if B had thrown it on a dust-heap, where E a year afterward had found it and innocently administered it to C, the force of A's act would have been spent before E found the poison, and A would not have been chargeable with the administration to C.<sup>3</sup> A drove B out of a house on a freezing night, and B was frozen; A is responsible only if his force was still active at the time of B's combination with the cold. If B might have found shelter elsewhere, A's act of thrusting B into the cold ceased to be an active agency in keeping him in it; if B chose to stay outside, A's connection with B's subsequent exposure is remote.<sup>4</sup> A knocked B down and was about to renew the attack; B drew his dagger to defend himself; A, in his haste to kill B, stumbled, fell upon the dagger, and was killed. This was not homicide by B *se defendendo*; A alone was chargeable with his own death.<sup>5</sup> The appellee, having succeeded in an appeal of robbery, alleged as an item of damage that he had been shut up in prison for a long time, by reason of the failure of the justices to deliver the jail at the proper time. But it was held that the long imprisonment was chargeable to the justices alone, not to the appellor; and the damages were not allowed.<sup>6</sup>

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<sup>1</sup> Non-Contract Law, § 44.

<sup>2</sup> Conceivably, of course, we might resolve every act of injury into its ultimate human forces, and charge each person who had set one of these forces in motion with his share of the act of injury. This would take us back to Adam in every case. Human knowledge is too small to perform such a task with justice, and time too short for the determination by this method of a single case. For their own protection, and for the security of the public at large, the courts refuse to go so far; beyond a certain point the operation of a force is called remote, and is disregarded. *Fleming v. Beck*, 48 Pa. 309, 313; *Squire v. W. U. Tel. Co.*, 98 Mass. 232, 237.

<sup>3</sup> See *Reg. v. Michael*, 2 Moo. C. C. 120, 9 C. & P. 356, Beale Cas. Crim. L. 378. See also to the same effect *Carter v. Towne*, 103 Mass. 507, with which compare an earlier report of the same case, 98 Mass. 567.

<sup>4</sup> *Hendrickson v. Com.*, 85 Ky. 281, Beale Cas. Crim. L. 430.

<sup>5</sup> 44 E. 3, 44, pl. 55. See also *Hilton's Case*, 2 Lew. 214; *Reg. v. West*, 2 Cox C. C. 500; *Reg. v. Bennett*, Bell C. C. 1, 28 L. J. M. C. 27; *Reg. v. Ledger*, 2 F. & F. 857.

<sup>6</sup> 42 Ass. pl. 19.

5. If the defendant contributed to the act of injury, he should be proved responsible for it in law in one of the ways suggested by Professor Wigmore. (a) His responsibility may be proved by showing that he intended either the combination or the result. Thus, while A was negotiating trade with natives on the coast of Africa, B fired upon a boat-load of the natives, and thus broke off the trade. This, it was shown, was B's purpose; and he was held liable.<sup>1</sup> So, in the case of poisoning just stated, the defendant was held liable for the administration of poison by D, since he intended that it should be administered, though by another.<sup>2</sup> (b) Defendant's responsibility may be proved by showing that he acted at his peril. Thus, where a carrier deviates, he becomes absolutely responsible for the safety of the goods during deviation, and is liable for loss even by act of God.<sup>3</sup> So where one stores water in a reservoir he is responsible for its action, wherever it goes, until its force has become exhausted.<sup>4</sup> Where a landowner employed a competent builder to build him a house, and the builder, unknown to the owner, placed one wall of the house within the highway, the owner is guilty of obstructing the highway.<sup>5</sup> (c) Defendant's responsibility may be proved by showing that he acted negligently; that is, that he might reasonably be required to guard against the combination because it was one in which possible danger lurked. This principle has nothing to do with a probable result; defendant need not have been able to foresee any particular result in order to be held negligent. It is the possibility of the act of injury which makes defendant liable. If the force he set in motion was such as to make reasonably possible such a combination of circumstances as did occur, was illegal, and resulted in harm, he is negligent in this sense.

A master sent aloft a seaman whom he knew to be unfit, through illness, to go aloft; the man fell into the sea, and was drowned. The master is liable for the death.<sup>6</sup> The master of a tug-boat struck with

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<sup>1</sup> *Tarleton v. M'Gawley*, Peake, 205. Lord Kenyon said (at p. 208): "Had this been an accidental thing, no action could have been maintained; but it is proved that the defendant had expressed an intention not to permit any to trade until a debt due from the natives to himself had been satisfied."

<sup>2</sup> *Reg. v. Michael*, *supra*.

<sup>3</sup> *Davis v. Garrett*, 6 Bing. 716.

<sup>4</sup> *Rylands v. Fletcher*, L. R. 3 H. L. 330, Smith Cas. Torts, 316.

<sup>5</sup> *Wills, J.*, in *Reg. v. Tolson*, 23 Q. B. D. 168, 173, Beale Cas. Crim. L. 286, 288.

<sup>6</sup> *U. S. v. Freeman*, 4 Mas. 505. This would, it would seem, still be true (in the absence of consent on the part of the seaman), though the master had provided such



his boat the fender of a bridge on which plaintiff was at work; the blow knocked out a brace between two piles, and the piles, coming together, crushed plaintiff between them. The master was liable, though the result of his act could not possibly have been foreseen.<sup>1</sup>

It is negligent to set going any force which according to the ordinary course of nature may bring about the act of injury. One so adjusts himself to the conditions in which he lives as to escape harm from the ordinary forces of nature; and a person who throws him out of adjustment with his surroundings is justly held responsible.<sup>2</sup> Thus where an insurance company became responsible for a fire among electrical machinery, and the fire by melting a connecting wire caused a short circuit, which so increased the speed of the machines as to injure them, it was held that the company must pay for the loss.<sup>3</sup> Where a vessel, having negligently been allowed to strike a shoal, was drifted by the tide against plaintiff's walls, the master was responsible for the collision.<sup>4</sup>

It is otherwise where an extraordinary operation of nature brings about the injury; there is no negligence in not anticipating it. So where a carrier delays the transportation of goods, which are thereupon overwhelmed by a flood, the carrier is not responsible for the loss caused by the flood.<sup>5</sup>

It is evident, however, that a voluntary human act cannot be treated like an act of nature. When an independent human act, subsequent to defendant's last voluntary act, forms one of the factors of the act of injury, the defendant cannot be held responsible on the ground of negligence unless he might have foreseen the other's act. But if he might have foreseen it, he ought to be responsible for the act of injury, even though the subsequent actor was also a voluntary wrong-doer, and was also liable.<sup>6</sup>

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means for rescuing the man, if he fell, that it seemed impossible that he could drown. The negligence consisted in allowing the contact of the seaman with the water, not in causing his death. See also *Reg. v. Archer*, 1 F. & F. 351.

<sup>1</sup> *Hill v. Winsor*, 118 Mass. 251, Smith Cas. Torts, 48. Compare *Reg. v. Horsey*, 3 F. & F. 287; *Reg. v. Serné*, 16 Cox C. C. 311, Beale Cas. Crim. L. 465.

<sup>2</sup> See a clear statement of the reason of this rule in Beven on Negligence, p. 73.

<sup>3</sup> *Lynn Gas & Electric Co. v. Meriden Ins. Co.*, 158 Mass. 570.

<sup>4</sup> *Romney Marsh v. Trinity House*, L. R. 5 Ex. 204, 7 Ex. 247, Smith Cas. Torts, 1.

<sup>5</sup> *Denny v. N. Y. Cent. R. R.*, 13 Gray, 481; Smith Cas. Torts, 16. But the rule first stated applies if the act of nature were to be anticipated, as a frost in winter. *Fox v. B. & M. R. R.*, 148 Mass. 220.

<sup>6</sup> *Guille v. Swan*, 19 Johns. 381; *Lane v. Atlantic Works*, 111 Mass. 136. This appears, perhaps, still more clearly when the two wrongful human acts are concurrent, though the principle is no doubt the same. *Mathews v. Tramway Co.* 60, L. T. Rep.

It is in connection with this principle that notice becomes important. A combination of circumstances which otherwise is most unlikely may be made probable by knowledge of the existence of unusual factors; and one to whom the existence of such factors was known might therefore be bound to guard against an injury for which otherwise he could not be held responsible. In the law of damages this principle is embodied in the so-called "rule in *Hadley v. Baxendale*."<sup>1</sup> A striking case, in which notice was essential, is *Com. v. Wing*.<sup>2</sup> Defendant was shooting wild fowl in a proper place, when he received notice that a girl in a neighboring house was in so peculiar a state of mind that she would be thrown into convulsions at the sound of a gun. Notwithstanding the notice he continued to shoot, and the girl was thrown into convulsions. Defendant was held guilty of a crime. Without notice, the only combination which defendant could foresee was that of the sound of his gun with a human being, — a harmless and legal combination, which he need not guard against. After the notice, he could foresee the combination of the sound of his gun with a diseased mind, and he should have guarded against it.

The remote and the improbable, it must be admitted, are often difficult to distinguish; indeed, what is remote is often also improbable. From this has resulted a confusion of the principles excluding the one and the other. The courts have seldom sufficiently discriminated between them; as, indeed, for the purpose of deciding an individual case it is not usually necessary to do. But the rules are clearly distinct in origin, in reason, and in application, and much confusion in the cases would be avoided by distinguishing them in theory, if not in practice.

It does not fall within my purpose to discuss the time at which the mental state of the defendant must exist. A settlement of the problem will probably furnish a rule in cases of contributory negligence. It seems likely that in the case of torts the defendant's

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47, *Smith Cas. Torts*, 91. But see *Holmes, J., in Hayes v. Hyde Park*, 153 *Mass.* 514. Of course the defendant would be responsible, as explained above, irrespective of negligence, if he intended the act of injury to result from the force he set in motion.

<sup>1</sup> 9 *Ex.* 341, 23 *L. J. Ex.* 179. The court held in that case that the damages recoverable for breach of contract "should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it."

<sup>2</sup> 9 *Pick.* 1, *Beale Cas. Crim. L.* 119.

responsibility depends upon his intention or his negligence at the last moment when it was possible for him to control the force he had set in motion. If, however, a factor of the act of injury is defendant's breach of contract, it appears to be held that defendant's ability to foresee the combination must exist at the time the contract was made.<sup>1</sup>

*J. H. Beale, Jr.*

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<sup>1</sup> *Gee v. L. & Y. Ry.*, 6 H. & N. 211; *Booth v. Spuyten-Duyvil R. M. Co.*, 60 N. Y. 487.



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THE EDITORS OF THE HARVARD LAW REVIEW gladly surrender this number to the commemoration of the twenty-fifth anniversary of the coming of Dean Langdell to the chair of a professor at the Harvard Law School.

There is no need that we should undertake to express the significance of that event. It is enough to say that it led to immediate and most important changes in the administration of the School, and to the application here of new principles and methods which have stood the test of time and have been widely adopted elsewhere; and that it has brought to the School not only a great raising of its standards, but also an unexampled prosperity.

All honor to him whose influence has been so great in bringing about these happy results.

On June 28th next, the day before Commencement, the Harvard Law School Association will celebrate this interesting event by an address in Sanders Theatre by Sir Frederick Pollock, LL.D., of London, and by a dinner for the members of the Association at Massachusetts Hall. It is hoped and believed that the occasion will draw to Cambridge a great gathering of the friends and graduates of the School.

This will not be Sir Frederick Pollock's first visit to our country, but it will, we believe, be the first occasion when he has spoken here in public. Of his early triumphs at Cambridge, where he was first Chancellor's medallist, in 1867, and of his place as a scholar, there is not room now to speak. Of his services to the legal profession as the founder and editor of the *English Law Quarterly Review*, as Professor of Law at Oxford and in the Inns of Court, as the Tagore Lecturer in Calcutta, as the author of valued contributions to the science of Jurisprudence, and especially to the law of Contracts, Torts, Property, Partnership and Sales, we need not speak. Of his last, but not least important work, in co-operation with Professor Maitland of the English Cambridge, namely, a "History of the English Law," in two volumes, a learned and most valuable book, only just published, it may be that our readers are not so generally aware.

And let us not fail to recall Sir Frederick's accomplishments as a poet, and his delightful "Leading Cases Done into English, by an Apprentice of Lincoln's Inn," a work dear to the hearts of law students.

Sir Frederick Pollock's presence will give distinction to our celebration. He will be heartily welcomed.

# HARVARD LAW REVIEW.

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## THE DOCTRINE OF PUBLIC POLICY AS APPLIED TO OWNERSHIP OF REAL ESTATE BY FOREIGN CORPORATIONS.

A STATE may, by legislative enactment, directly and expressly prohibit a foreign corporation from taking or holding land within its borders. But, in the absence of such an enactment, is it for the courts to lay down a prohibitory rule, — and, if so, under what circumstances?

Little is to be found upon this subject in the text-books, and the number of cases in which it has been considered is quite limited. Yet the question is of great practical importance, when boundary lines must be looked to, in passing on the right of a corporation to purchase or become the devisee of lands.

It is elementary that a corporation of one State may not exercise its powers in another State, without the express or implied consent of the latter, and that the right to hold and the mode of acquiring title to land depends upon the local law of the territorial sovereignty; but under what conditions may the courts, speaking for the State, withhold the requisite consent, and what are the guiding rules under which the local law is to be determined in the case stated?

In *Bank of Augusta v. Earle*,<sup>1</sup> Chief-Justice Taney quotes with approval the proposition laid down in Story's "Conflict of Laws,"

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<sup>1</sup> 13 Peters, 519.

that "in the absence of any positive rule affirming or denying or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests." He then goes on to say, that "whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered injurious to its interests, the presumption in favor of its adoption can no longer be made."

In the *Girard Will Case*,<sup>1</sup> Mr. Justice Story observes that, in seeking to discover the public policy of a State, the court is limited to what "its constitution and laws and judicial decisions make known to us."

In a case<sup>2</sup> involving the legality of a certain devise of real estate to a foreign corporation, Mr. Justice Harlan states the law thus: "In harmony with the general rule of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its higher courts."

The authorities thus quoted are sufficient to show that, notwithstanding the absence of a direct prohibitory statute, the courts of a State may deny the power of a foreign corporation to take and hold real estate within its limits, although authorized thereto by the law of its creation, but that the right to do so depends entirely upon the public policy of the State on the subject, which the courts are to ascertain from the proper sources, and not themselves to inaugurate. The statement that the policy of a State on any given subject is to be sought in its judicial decisions, as well as in its statutes, obviously does not imply that the judicial tribunals of a State may originate such policy; coming from a Federal court, it means merely that when a judicial definition of State policy, based upon a construction of constitutional or statutory provisions, has been made by the local court, it will be accepted and followed by the Federal court in cases to which such provisions apply.

The public policy of the State to be sought and applied is not

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<sup>1</sup> 2 Howard, 127.

<sup>2</sup> *Christian Union v. Yount*, 101 U. S. 352.



that public policy defined to be the principle of law which holds that no subject or citizen can lawfully do that which is injurious to the public or against the public good,<sup>1</sup> — a principle, the application of which has not infrequently led to judicial legislation, and which, it has been said, “is never argued at all but when other points fail.” Apply this rule to the subject in hand, and the result will depend upon what, as a matter of sound policy, a given court thinks the law ought to be, and not upon what the law actually is.<sup>2</sup> Instances are not wanting in which courts have inclined to believe they might properly do this. For example, Mr. Justice Christiancy, of the Supreme Court of Michigan,<sup>3</sup> enumerates certain consequences which he thought might result from permitting foreign corporations to acquire real property in that State: —

“1. The danger of their becoming speculators in lands to large amounts, keeping them unimproved, or introducing a system of tenancies in which the tenants would be in a great measure dependent upon such corporation.

“2. The holding of such lands for a long period of time, as they pass by perpetual succession without any change or break by death, as in the case of natural persons.

“3. The influence which wealthy corporations holding large bodies of land in the State might exercise upon the legislature.”

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<sup>1</sup> Lord Brougham in the *Bridgewater Will Case*, 4 H. L. Cases, 1.

<sup>2</sup> Two amusing instances of the extent to which judges have permitted their views of what is contrary to public policy, or the public good, to influence their judgment, may be cited. In *King v. Waddington*, 1 East, 143, the defendant was sentenced to fine and imprisonment for contracting for one fifth of the hop product of two counties, as a speculation, with the view to raise the price by telling sellers that hops were too cheap, and planters that the price was too low. It was held that this was against public policy, and Grose, J., in delivering the opinion of the court, said: “It would be a precedent of most awful moment for this court to declare that hops, which are an article of merchandise, and which we are compelled to use for the preservation of the common beverage of the people of this country, are not an article the price of which it is a crime by undue means to enhance.”

In *Locke's Appeal*, 72 Penn. 491, the court, by a majority opinion, sustained the constitutionality of a local option liquor law. Mr. Justice Read, in the course of a dissenting opinion, expressed himself as follows: “The question of license or no license is to be submitted to the citizens of Philadelphia at the general election in October, and if the vote is against license, then the city will be under a prohibitory liquor law during the whole Centennial celebration to which we have invited the whole country. On the 4th July, 1776, every patriot drank to the independence of the thirteen States; shall it be that on the 4th July, 1876, all we can lawfully offer to our guests on this great anniversary will be a glass of Schuylkill water, seasoned with a lump of Knickerbocker ice? I believe in moral suasion as the true means of advancing the temperance cause; but I do not believe in a prohibitory law which would reduce us to the condition of Boston.”

<sup>3</sup> *Thompson v. Waters*, 25 Mich. 214.

He then goes on to say: "They are all very proper considerations for a constitutional convention in framing the fundamental law, and for the people in adopting it, as well as for the legislature, who, in all matters not fixed by the Constitution, are properly vested with the power of determining the public policy; and in a case where it should very clearly appear to the court, from the amount of the lands purchased, or the purposes for which they were purchased, or other circumstances, that the dangers mentioned were seriously to be apprehended, it may be that the court would be authorized, without any legislative prohibition to that end, to refuse to recognize the law of the State creating the corporations, or so much of it as had undertaken to confer the right of holding such lands."

No case, however, it is believed, can be found in which a court of last resort has denied the right of a foreign corporation to hold real estate, as against public policy, solely because in the opinion of the court the exercise of such a right would be injurious to the public, or prejudicial to the interests of the State. On the other hand, whenever the question has been directly presented, the authority to make a decision on such a ground has been disclaimed. Thus, in an early New Hampshire case,<sup>1</sup> it was objected that a banking corporation established in Massachusetts had no right to hold and convey real estate in New Hampshire. The court, in overruling the objection, said: "If any evil is to be apprehended in this respect, the remedy for the correction of it lies not with us." And in an Ohio case,<sup>2</sup> the Chief Justice of that State said: "There is nothing in the legislation of this State to limit the general capacity of the Bible Society to take by devise real estate in Ohio. There are no statutes of mortmain in this State. For myself, I heartily wish there were. But we must declare the law as we believe it to be."

In recognition of the danger that courts in applying the doctrine of public policy may act legislatively, and not judicially, the modern decisions, while maintaining it to be the duty of the courts to keep in sight the public good, set bounds to the domain within which this duty is to be exercised.<sup>3</sup> It would seem that outside of certain well-defined classes of acts which under the common law are contrary to public policy, — as, for example, contracts in re-

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<sup>1</sup> *Lumbard v. Aldrich*, 8 N. H. 31.

<sup>2</sup> *American Bible Society v. Marshall*, 15 Ohio St. 537, 544.

<sup>3</sup> *Anson on Contracts* (6th ed.), 192.



straint of trade, injurious to the public service, to prevent the course of justice, or contrary to good morals, — the public policy which the courts are justified in invoking is that only which is clearly manifested by the legislation or fundamental law of the State. The buying and selling or holding of real estate by a foreign corporation does not fall within any of the classes of acts referred to. Accordingly, if it is forbidden by the public policy of a State, that policy must have been established by the law-making power of the State. It does not originate in the judicial tribunals. It is drawn solely from the constitution and statutes, and it is only by reference to their general scope that it is discovered and announced by the courts. It is the policy of the legislative, not of the judicial, department of the government. In the language of the New York Court of Appeals: "The rules of comity are subject to local modification only by the law-making power; until so modified, they have the controlling force of legal obligation. The franchises and immunities which they secure it is the duty of the courts to respect until the sovereign sees fit to deny them."<sup>1</sup> This proposition, of course, is subject to the condition that the business to be transacted is such as a natural non-resident person might lawfully transact in the State.

In the absence, therefore, of a prohibitory law, or of legislative or constitutional provisions from which a settled policy to the contrary may fairly be deduced, the courts should be bound by the law of comity, and recognize the right of a foreign corporation, authorized thereto by the law of its creation, to acquire and hold lands within the State.

The modern attitude of legislatures and courts toward foreign corporations is such that there is little occasion to consider the public policy of a State in the matter of lands acquired by corporations of another State, to be held merely as incidental to the carrying on of a legitimate business, — as, for example, real estate devoted by the corporation to the purposes of a railroad or manufacturing industry, or used as a warehouse or store in the carrying on of the corporate business. The subject assumes importance only in connection with corporate ownership of lands held purely as a direct source of pecuniary gain or income, as in the case of land companies, and religious, educational, and charitable institu-

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<sup>1</sup> *Merrick v. Santvoord*, 34 N. Y. 208. See also *Hollis v. Drew Seminary*, 95 N. Y. 166; *Band v. Poole*, 12 N. Y. 495; *Lancaster v. A. I. Co.*, 140 N. Y. 576, 592.



tions holding real estate for the revenue to be derived therefrom. Without doubt it would not contravene the policy of any State if a manufacturing corporation should acquire real estate therein, to be used as a factory in the prosecution of the corporate enterprise, or if a foreign mercantile corporation should purchase a building in which to display and vend its goods. But in the case of land companies, whose sole purpose is to deal in lands, and corporations having the power to take real estate to hold as they hold stocks and bonds, merely for the resulting gain or income, a different question is presented. In some States, an apprehension that the recognition of the powers of such corporations might lead to monopolies in agricultural or mining lands, and discourage or prevent their settlement or development, or tend to establish landlordism, has manifested itself in legislation from which a policy hostile to the acquisition of real estate by such corporations might be deduced.<sup>1</sup>

In some States, the spirit of the ancient mortmain laws of England has been invoked to influence legislation in this matter.<sup>2</sup> In other States, a liberal policy, which imposes no restriction, has been adopted.

It seems to be settled that the policy of a state upon this subject, if it is to be applied by the courts, must appear affirmatively. It is not to be inferred from the mere absence of legislation. As

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<sup>1</sup> It is said that twenty million acres of land in the United States are owned in England and Scotland. A syndicate composed of foreign capitalists, and known as the Texas Land Union, is reported to own whole counties in Texas, and to have thousands of persons as tenants. It has been shown, however, in a recent article, by Mr. J. R. Dodge, the statistician, that much has been said of the tendency to land monopoly and landlordism which the facts do not warrant. A comparison of results of the tenth and eleventh censuses shows that in 1890 of the farms of the country 71.63 per cent were cultivated by the owner, against 74.42 per cent in 1880; and the increase in farms rented during the ten years succeeding the census of 1880 was only 1.92 per cent of all. This increase is accounted for to quite an extent by natural causes. For example, in the South, the increase of tenant farming is largely due to free labor, the division of plantations, and share rental to freedmen, — a change more nominal than real, as the planter is quite as much a partner as a landlord, having often to furnish horses and implements, seed and food as well as land. In the West it appears that the proportions of persons owning the farms they cultivate have increased, — a tendency directly away from assumed monopoly.

<sup>2</sup> In 1883, a bill passed by the Massachusetts Legislature, allowing the Somerville Wharf and Improvement Company two years further in which to organize as a corporation, was vetoed by Governor Butler, who stated as "the great and controlling objection to the bill, that it gives to the corporation the right to hold land in perpetuity, and to act for no other purposes whatever. This land, in the language of the books, would be held in mortmain, or by the dead hand."

put by Mr. Justice Field,<sup>1</sup> "if the policy of the State does not permit the business of the foreign corporation in its limits, or allow the corporation to acquire or hold real property, it must be expressed in some affirmative way; it cannot be inferred from the fact that its legislature has made no provision for the formation of similar corporations, or allows corporations, to be formed only by general law."

The question presented in the case, from which this quotation is made, was as to the right of a Pennsylvania land company to acquire and hold lands in the Territory of Colorado. By the Act of Congress then in force, the legislatures of the several Territories in the country were prohibited from granting private charters, and were only authorized to create by general law corporations for mining, manufacturing, and other industrial pursuits. The contention was that Congress intended to prevent the creation of corporations like this one of Pennsylvania, as the extensive powers granted to it tended to monopolize landed estates for purposes of speculation, and thereby injure the agricultural, mining, and manufacturing interests of the country; and if a domestic corporation could not be created with such powers for reasons of public policy, a foreign corporation could not for like reasons be permitted to exercise them in the Territory. The court disposed of this contention by holding that such a policy was not deducible from the legislation upon the subject, and referred to the fact that telegraph companies did business in the Territories before any law was passed there authorizing the formation of such companies.<sup>2</sup>

There may, however, be some circumstance in connection with the absence of legislation in a State authorizing the formation of

<sup>1</sup> *Cowell v. Springs Co.*, 100 U. S. 55.

<sup>2</sup> An instance may be cited where a failure to appreciate or apply the doctrine of this case led to an erroneous conclusion. Revised Statutes of Illinois, 1874, ch. 32, § 26, provides that foreign corporations doing business in the State shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the laws of the State, and shall have no other or greater powers. In *United States Mortgage Co. v. Gross*, 93 Ill. 483, it was held that § 1 of the chapter in question, setting forth that "corporations may be formed in the manner provided in this act for any lawful purpose except banking, insurance, real estate brokerage, the operation of railroads and the business of loaning money;" taken in connection with § 26 of the statute and the rule against perpetuities, operates to exclude foreign corporations from loaning money in the State. This decision was overruled in *Stevens v. Pratt*, 101 Ill. 206, the obvious fact being recognized that the language used in § 1, "Corporations may be formed in the manner provided in this act, for any lawful purpose," etc., does not exclude corporations formed under some other act.



corporations to transact a particular business which clearly indicates a legislative policy to prevent foreign corporations from transacting the business in question in the State. Thus, in the Texas case of *Empire Mills v. Allston Grocery Company*,<sup>1</sup> the defendants, who were citizens of Texas, had formed a corporate organization under a general law of the State of Iowa for the purpose of carrying on a mercantile business in the State of Texas. The constitution of Texas prohibits the creation of private corporations except under general laws. By an act of the legislature provision was made for the creation and operation of mercantile companies. This provision was subsequently repealed. The repeal, it was held, was a denial of the right to form, and a prohibition of the operation of such corporations in Texas. The Statute granted the privilege and then revoked it, thereby superseding the rule of comity. The court accordingly refused to recognize the legality of the corporation, and the defendants were held liable as partners to the plaintiff.

The question of the public policy of a State in the matter of the holding of lands for speculation or revenue by a foreign corporation has been directly presented and decided in Illinois, New York, New Hampshire and Ohio.<sup>2</sup>

In the case of *Carroll v. East St. Louis*,<sup>3</sup> a Connecticut land company had purchased real estate in Illinois, which it subsequently sold and conveyed to the city of East St. Louis. The plaintiff, who claimed under the grantor of the land company, brought a suit of ejectment against the city, contending that it was against the public policy of the State of Illinois to permit a foreign corporation, created for the sole purpose of buying and selling lands, to take title to land in Illinois. At the outset of the discussion the court properly limited itself to a consideration of the legislation applicable to the subject. "In this investigation," the court said, "it must be remembered that the law-making power of the State, where the authority is proposed to be exercised, is alone invested with the authority, and must determine its public policy. With this power the courts have not been intrusted. It is for them to ascertain and apply the law and the legislative policy, and not to inaugurate it. The public policy of the State may be

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<sup>1</sup> 15 S. W. Reporter, 200, 505.

<sup>2</sup> *Lumbard v. Aldrich*, 8 N. H. 31; *American Bible Society v. Marshall*, 15 Ohio St. 537; *supra*, p. 94; *N. H. Land Co. v. Tilton*, 19 Fed. Rep. 73.

<sup>3</sup> 67 Ill. 568.



ascertained by reference to the general course of legislation, either by prohibitory or enabling acts, or by its general course of legislation upon a given subject." It appeared by reference to the general laws authorizing the formation of corporations for various purposes, as well as from many special laws, that the legislature has restricted the power of corporations organized thereunder to hold real estate, either to a specified amount in value or in quantity, or to such as might be necessary to carry on the business for which they were chartered; and in some cases, where corporations had been authorized to receive donations of lands, it was provided that they should sell the same in three, five, seven, or ten years at the most. The court came to the conclusion that these restrictions unmistakably showed a settled policy, on the part of the legislature, that no means should be possessed by corporations, whether as the primary or auxiliary purpose of their creation, to hold lands in perpetuity. It was said that the legislature had in other modes, and on many occasions, — as, for example, in abolishing entails, — manifested a determination that perpetuities in real estate should not exist in the State. It was accordingly held that it was against the policy of the State to permit a foreign land company to purchase lands in Illinois, because it might hold such lands in perpetuity.<sup>1</sup>

The soundness of this conclusion may well be doubted. It may fairly be asserted that the restrictions upon corporate ownership of real estate imposed by the legislature, in place of indicating the policy inferred by the court, were intended merely to confine corporations to the purposes of their incorporation, and to secure a prudent management of their funds, by forbidding them to invest in real estate except within certain defined limits. The restriction of the right to acquire real estate contained in the National Banking Act is so interpreted. In referring to similar restrictions in the charter of a State bank, Chancellor Kent speaks of them as "only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations."<sup>2</sup> In

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<sup>1</sup> NOTE. — In pursuance of this supposed policy, the same court has held that a foreign trust company could not be a trustee of real estate in Illinois. *U. S. Trust Co. v. Lee*, 73 Ill. 142.

It also held void a devise to a foreign Bible society, on the rule adopted in *Carroll v. East St. Louis*; *Starkweather v. American Bible Society*, 72 Ill. 50; but in a subsequent case a similar devise to a Wisconsin corporation was sustained. *Female Academy v. Sullivan*, 116 Ill. 375.

<sup>2</sup> *Silver Lake Bank v. North*, 4 Johns. Ch. 370.

the well-known case of *Lathrop v. Commercial Bank*,<sup>1</sup> the court, speaking of the fact that most acts of incorporation in Kentucky concede a special authority to purchase land for specified purposes, say: "That course of legislation has arisen either from a prevailing opinion that statutory corporations in this country shall possess no other powers than those expressly granted, or from a prudential determination to limit and define their rights and capacities with precision, and especially in relation to the purchase of real estate." Beyond this, mere ownership by a corporation of real estate in fee is not within the rule against perpetuities.

Still, it may be urged that, admitting technically such ownership does not create a perpetuity, nevertheless it is a fair inference that the State imposed upon her corporations the restrictions referred to in order that land might not, except in certain specified cases, be held in mortmain by an immortal being. The answer to this would seem to be that it is not reasonable to draw such an inference, because there is no necessity for the adoption of the mortmain policy or laws in this country. Land with us has not the privileges which were attached to it in feudal times in the country where the mortmain laws originated; and the reserved power of the State to alter or repeal corporate charters is ample to ensure any needed regulation or control of corporate ownership of real estate.

In *Christian Union v. Yount*,<sup>2</sup> the question was as to the validity of a devise of real estate in Illinois to a missionary society incorporated under the laws of New York. *Carroll v. East St. Louis* was quoted as authority for the broad contention that foreign corporations were prohibited by the settled policy of the State of Illinois from taking, purchasing, or holding lands within its limits. The court, however, held that the decision in this case did not conclude the point involved in the case before it, inasmuch as it appeared that, under the general laws of Illinois, domestic missionary corporations had power to take and hold real estate; and it was decided that the existence of a public policy forbidding a foreign missionary corporation to take or hold real estate in Illinois could not be inferred from the general course of legislation or judicial decisions in that State.

Upon the same ground, it was held in the recent case of *Taylor*

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<sup>1</sup> 8 Dana (Ky.), 114.

<sup>2</sup> 101 U. S. 352.



*v. Alliance Trust Company*,<sup>1</sup> that a foreign corporation may hold real estate in Mississippi. Under the Statutes of this State, domestic corporations are, with a few exceptions, authorized to hold real property to any amount. "It is idle," say the Court, "to talk of the existence of a public policy against ownership of lands by corporations, in the light of this legislation. No distinction is made between foreign and domestic corporations."

In *Lancaster v. Amsterdam Improvement Company*,<sup>2</sup> the New York Court of Appeals, reversing the decision of the General Term, held that under the laws of New York, a foreign corporation formed to deal in the purchase and sale of real estate, can transact its corporate business in that State. The opinion of the General Term went upon the ground, in substance, that the right of the corporation to acquire, hold and convey land within the State was to be determined by reference to two general statutes, which were taken to be the only statutes recognizing the right of foreign corporations to take and hold real property in the State, and by reference also to certain special legislation. The first statute, passed in 1877, authorized a foreign corporation to purchase at a sale under the foreclosure of a mortgage or under a judgment held by it, to hold the land purchased for not exceeding five years, and to convey it. The second, passed in 1887, authorized a foreign corporation doing business in the State to acquire such real property as might be necessary for its corporate purposes in the transaction of its corporate business in the State. The last statute, it was thought, was not broad enough to authorize a foreign corporation to take, hold and convey real estate as a business and for the purpose of speculation; and the first statute was deemed to negative the idea that a foreign corporation has such power. No authority being conferred by the general laws on the subject, it was inferred from numerous special acts of the legislature, authorizing certain foreign corporations to acquire lands by purchase or devise, to be the policy of the State not to permit such corporations to take, hold and convey lands in the State, without being specially authorized to do so. It was said, *arguendo*, that domestic corporations formed for purchasing, holding, improving and conveying real estate are limited in the amount which they may hold to \$1,000,000, unless the corporation is organized for the purpose of erecting in a city a building to be rented

<sup>1</sup> 15 Southern Reporter, 121. See also, *Reorganized Church, &c. v. Church of Jesus Christ*, 60 Fed. Rep. 937.

<sup>2</sup> 140 N. Y. 576.



for offices and stores; but if foreign corporations may legally acquire, hold and convey land in the State at pleasure, there is no limitation upon the amount which they may acquire and convey, except their ability to purchase and pay for land.

The Appellate Court declared that it was "not confined to any such narrow ground as a construction of the particular acts referred to, and that in its judgment the learned General Term justices, if they had not overlooked, had failed to give due weight and significance to other provisions upon the statute books. A general law passed in 1892 accords to all foreign stock corporations the same right to transact their business in the State as domestic corporations have, if it be one which the latter may also lawfully transact, and provided there has been compliance with certain stated requirements.<sup>1</sup> Another general law provides for the formation of domestic corporations to carry on "any lawful business." Dealing in the purchase and sale of lands is held to be a lawful business. While the Statute of 1877 contains a limitation upon the right of foreign corporations to hold real property, with respect to time, the subsequent act of 1887 is in the direction of removing such or any limitation, and, finally, the Statute of 1892 allows all foreign corporations to do business in the State, upon compliance with conditions named, and places them upon a similar footing with domestic corporations as to the transaction of corporate business. The special legislation which has been procured by foreign corporations does not, it is held, indicate any policy of the State in the matter. If special enabling acts have been procured, in particular cases, the Court say, they do not necessarily disprove the general right. Prudence and cautious

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<sup>1</sup> The material part of the law of 1892 is as follows:

No foreign stock corporation other than a monied corporation shall do business in this State without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this State, and that the business of the corporation to be carried on in this State is such as may lawfully be carried on by a corporation incorporated under the laws of this State for such or similar purposes. . . . The Secretary of State shall deliver such certificate to every such corporation so complying with the requirements of law. . . . No foreign stock corporation doing business in this State without such certificate shall maintain any action upon any contract made by it in this State until it shall have procured such certificate. Before granting such certificate the Secretary of State shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within the State, and a place within the State which is to be its principal place of business, and designating a person upon whom process against the corporation may be served within the State. The person so designated must have an office, &c.

counsels may have dictated their procurement. To the suggestion that if foreign corporations may legally acquire and convey land in the State at pleasure, there is no limitation upon the amount which they may hold, it is answered that it is always within the power of the legislature to interfere and to regulate, if, by the magnitude of the business, the public interests are affected and seem unduly threatened. The case, it is held, does not fall within those which the courts have decided to be against public policy; the business is not immoral in itself, and it is not prohibited by legislation.

The legislation under which this case was decided is quite similar to that existing in some of the States, where as yet no judicial definition of State policy on the subject under discussion has been made; and if the occasion shall arise there for obtaining such a definition, the opinion of the New York Court will doubtless carry much weight.

The enlightened manner in which this court from its earliest history has dealt with questions involving corporate rights and privileges has been an important factor in the maintenance and growth of the commercial supremacy of a great State. Seventy-five years ago, Chancellor Kent said,<sup>1</sup> when the standing of a foreign corporation in the Equity Court of New York was questioned, "This court ought to be as freely open to such suitors as a court of law, and it would be most unreasonable and unjust to deny them that privilege. They might well exclaim:

'Quod genus hoc hominum? . . .  
. . . hospitio prohibemur arenæ.'

Not only has the day gone by when foreign corporations, merely as such, may properly be looked upon with suspicion, but at the present time, the assimilation of real to personal property, for all the purposes of commerce, is such that the necessity for restraining laws has to a very great extent ceased. Judicial construction of legislation upon this subject should therefore be along broad and liberal lines, and not narrowed by the notion that foreign corporations "carry a black flag," or influenced by the ancient learning of English statutes inapplicable to our situation, and never adopted as a part of the law of our land.

In conclusion, it may be well to call attention to a question which might in some contingencies be of great practical importance to a corporation compelled to defend its title to lands in a

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<sup>1</sup> *Silver Lake Bank v. North*, 4 Johns Ch. 370



State against an attack based on the contention that the public policy of the State forbade the corporation to take or hold the lands in question. In such a controversy, the right to choose the forum might be decisive of the case. Under the provisions of the Act of Congress declaring that the laws of the several States, except when the Constitution, treaties, or statutes of the United States otherwise require, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply, the construction given to a State statute by the highest judicial tribunal of such State is generally followed without question by the Federal courts in deciding matters to which the local statute is applicable. If a foreign corporation should acquire real property in a State after the court of last resort in that State had clearly declared the public policy of the State to be opposed to the acquisition of real estate by such a corporation, a Federal court would, if the case should be presented to it, accept the rule of policy announced by the State court as a part of the legislation of the State upon the subject. But suppose the decision of the State court is made after the corporation has acquired lands in the State, and the question of the title of the corporation is then litigated in a Federal court by original suit therein, or by removal of the cause from the State court; is the Federal court bound to accept and follow the construction of the statutes in question adopted by the local court?

On this point, Mr. Justice Harlan, in *Christian Union v. Yount*, *supra*, said, after alluding to the general rule: "But how far the Federal courts, in the ascertainment and enforcement of property rights depended upon the statute law, or the public policy of a State, are bound by the decisions of a State court, rendered after such rights were acquired or became vested, is a different question, and one of the gravest importance." The rule upon this subject he did not discuss, because the local decisions upon which counsel relied did not in the view of the court conclude the precise point involved in the case.

In a later case,<sup>1</sup> however, the rule is stated to be that "where contracts and transactions have been entered into, and rights have accrued thereon, when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a

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<sup>1</sup> *Burgess v. Seligman*, 107 U. S. 20, 23.



different interpretation may be adopted by the State courts after such rights have accrued." It is said that "as the very object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States was to institute independent tribunals which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication."

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## THE RISK OF LOSS AFTER AN EXECUTORY CONTRACT OF SALE IN THE COMMON LAW.

IN the English and American law of sales of personal property there is curiously little discussion in regard to the risk of property before transfer of title. It was assumed without discussion that the maxim *res perit domino* was of universal application,<sup>1</sup> and this bare assertion has sufficed to fix the law.<sup>2</sup> In the absence of agreement to the contrary, the risk is with the seller, though the property be identified, till the moment when title is transferred. If the property is destroyed or injured before that time, the buyer cannot be compelled to pay the price,<sup>3</sup> and if he has paid the price in advance, it may be recovered.<sup>4</sup> It is well understood, however, that the parties may, by special agreement, fix

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<sup>1</sup> It is curious that this maxim of the Roman law should be quoted in our law chiefly in a class of cases to which it did not apply in the Roman law.

<sup>2</sup> In Noy's Maxims, c. xlii. it is said: "If I sell my horse for money, I may keep him until I am paid, but I cannot have an action of debt until he be delivered, yet the property of the horse is by the bargain in the bargainee or buyer; . . . and if the horse die in my stable between the bargain and the delivery, I may have an action of debt for my money, *because by the bargain the property was in the buyer.*" It will be observed that the case here supposed is a sale with a lien for the price. As the dependency of mutual promises in any executory bilateral contract was little understood before the present century, and the question whether impossibility is so far an excuse for non-performance of a dependent promise, that the counter promise must nevertheless be performed, has been settled still more recently, it is obvious that only modern decisions have much value in this discussion. In *Rugg v. Minett*, 11 East, 210, it was taken for granted that risk attends title, and the only discussion related to the question whether title had in fact passed. So clear is the law that it is hardly formally stated by so acute a writer as Benjamin. The only statement he makes is a casual one, without citation of authorities, in § 308.

<sup>3</sup> *Calcutta Co. v. De Mattos*, 32 L. J. Q. B. 322, 335; *Tillson v. United States*, 129 U. S. 101; *Hays v. Pittsburgh Packet Co.*, 33 Fed. Rep. 552; *Jones v. Pearce*, 25 Ark. 545; *Crawford v. Smith*, 7 Dana, 59; *Brown v. Childs*, 2 Duv. 314; *Lingham v. Eggleston*, 27 Mich. 324; *Hahn v. Fredericks*, 30 Mich. 223; *Wilkinson v. Holiday*, 33 Mich. 386; *Slade v. Lee*, 94 Mich. 127; *Drews v. Ann River Logging Co.*, 53 Minn. 199; *Fairbanks v. Richardson Drug Co.*, 42 Mo. App. 262; *Towne v. Davis* (N. H.), 22 At. Rep. 450; *Terry v. Wheeler*, 25 N. Y. 520; *Kein v. Tupper*, 52 N. Y. 550.

<sup>4</sup> *Logan v. Le Mesurier*, 6 Moo. P. C. 116; *Stone v. Waite*, 88 Ala. 599; *Joyce v. Adams*, 8 N. Y. 291; *Williams v. Allen*, 10 Humph. 337. The citations in this and the preceding note might easily be increased.

the transfer of the risk at a different time from the moment when the title passes.<sup>1</sup>

Thus far it has been assumed that the buyer was not in default at the time of the accident. If the buyer was in default, the seller has several remedies against him. He is generally allowed to treat the goods as the buyer's, and sue for the price, or he may retain the goods and sue for damages for breach of the contract. If he takes the first course, he becomes a bailee, and if a loss occurs without his fault the buyer must bear the loss; if the latter course, the loss falls on the seller. If the seller has not indicated which course he intends to pursue, the loss would probably fall on him, since the former remedy is the more unusual, and it would not be assumed that the seller was holding the property for the benefit of the buyer unless he had indicated it in some way.<sup>2</sup>

The law in regard to risk in sales of personal property is thus generally settled, and though without discussion, yet probably correctly and in accordance with the intention of the parties. There are a few cases, however, where there is a conflict of decision. Suppose the seller delivers the property to the buyer with the agreement that the seller shall retain title until the price is paid, — the ordinary case of conditional sale, — and before the time for payment the property is destroyed. This sort of transaction has become very common of late years, and not infrequently the buyer gives a promissory note containing the statement that the note is given for a specified chattel, the title of which is to remain in the seller until the note is paid. Should the loss fall on the seller because he holds the legal title?<sup>3</sup>

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<sup>1</sup> *Inglis v. Stock*, 10 App. Cas. 263; *Martineau v. Kitching*, L. R. 7 Q. B. 436; *Castle v. Playford*, L. R. 5 Ex. 165; 7 ib. 98; *Alexander v. Gardner*, 1 Bing. N. C. 671; *Fragano v. Long*, 4 B. & C. 219.

<sup>2</sup> See *Neal v. Shewalter*, 5 Ind. App. 147, where the loss was thrown on the sellers because they "did not place themselves in the position of bailees for the" purchasers.

<sup>3</sup> In *Top v. White*, 12 Heisk. 165, this question arose in regard to slaves which had been delivered with an estate under a contract of sale, but the title had been retained. Before the contract was fulfilled the slaves were emancipated. It was held that the purchaser must pay the price, the court saying (at p. 190): "In the application of the maxim, property perishes to the owner, I understand by the owner not the party who has the naked legal title, but the party who is the beneficial equitable owner." So makers of promissory notes such as those described have been held liable, though the property which has the consideration of the note perished before its maturity. *Burnley v. Tufts*, 66 Miss. 48; *Tufts v. Wynne*, 45 Mo. App. 42; *Tufts v. Griffin*, 107 N. C. 47. Contrary decisions are *Randle v. Stone*, 77 Ga. 501, and *Arthur v. Blackman*, 63 Fed. Rep. 536 (North Dist. of Washington).

In *Swallow v. Emery*, 111 Mass. 355, such a note was held not to be a negotiable



In order to determine the proper answer to this question, it is necessary to consider the legal position of the parties to an executory contract for the sale of personal property. Only personal obligations are created. The purchaser acquires no *jus in rem*, and the owner "may, in defiance of his contract, sell to some third person and give him a perfectly good title, even if that third person had notice of the prior contract."<sup>1</sup> It is necessary also "to point to a distinction, which, although a fine one, seems nevertheless to be a clear one, between contracts which are intended to operate as sales at some future time, and contracts which are intended to operate merely as promises to sell. It is the difference which exists between an agreement that the property shall pass on the happening of some future event without anything further to be done by either party in that behalf, and an agreement by which one party promises that on the happening of some event he will then transfer the property."<sup>2</sup> It is comparable to the difference be-

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promissory note because, as the court said, if the consideration perished before maturity, the maker would not be liable. The note was therefore not an absolute promise. A similar decision, based on the same reason, was made in *Sloan v. McCarty*, 134 Mass. 245. On the other hand, in *Chicago, &c. Co. v. Merchants' Bank*, 136 U. S. 268, such a note was held negotiable, and the argument of the Massachusetts cases was expressly denied, the court saying that the maker would be bound to pay the note even though the property for which it was given perished by accident before maturity of the note. Other decisions holding such notes negotiable, and necessarily involving, though not stating, the same conclusion, are *Howard v. Simpkins*, 69 Ga. 773; *Mott v. Havana Bank*, 22 Hun, 354; *Heard v. Dubuque Bank*, 8 Neb. 10; *Newton Wagon Co. v. Diers*, 10 Neb. 284; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133. It was held that such notes were not negotiable, but for reasons not affecting the question under consideration, in *Killam v. Schoeps*, 26 Kan. 310; *South Bend Works v. Paddock*, 37 Kan. 510; *Wright v. Traver*, 73 Mich. 493; *Third Bank v. Armstrong*, 25 Minn. 530; *Minneapolis Harvester Works v. Hally*, 27 Minn. 495; *Stevens v. Johnson*, 28 Minn. 172; *Deering v. Thom*, 29 Minn. 120; (but see *Aultman v. Olson*, 43 Minn. 409); *Dominion Bank v. Wiggins*, 21 Ont. App. 275.

<sup>1</sup> Blackburn, *Contract of Sale*, 2d ed., p. 244.

<sup>2</sup> *Ibid.*, p. 247. The passage continues: "In the latter case the property does not pass until he does not sell the thing, although the event may have happened, and such a contract at law creates merely a personal obligation to pass the property, and that at law will not create any real right or *jus in rem*. In equity, however, the vendee is in a better position, and such a contract would, when the event had happened, give him a good equitable title to the goods against all persons, excepting any one who, in the mean time and *bona fide*, may have had the property transferred to him." The leading case illustrating the rule in equity is *Holroyd v. Marshall*, 10 H. L. C. 191. See also *Collyer v. Isaacs*, 19 Ch. D. 342; *In re Clarke*, 36 Ch. D. 348; *Morris v. Delobel-Flipo*, [1892] 2 Ch. 352, and other cases therein referred to. In the United States this doctrine of equity is generally followed (*Am. & Eng. Cyc. of Law*, vol. iii. pp. 183, 184, vol. xxi. p. 472) but not universally. *Blanchard v. Cooke*, 144 Mass. 207. It will be observed that the question can only arise in equity when the contract of sale is one of which equity

tween the present purchase of property in remainder expectant on the death of A., and an executory agreement to purchase the same property upon the death of A. It seems obvious that, in the first class of cases, where the buyer intends the present purchase at the moment of entering into the agreement of a future right, the loss should fall upon the purchaser.<sup>1</sup> A third case arises where the agreement is that the buyer shall at once receive all the incidents of ownership except the bare legal title which is retained as security. It is this last case that is illustrated by a sale with delivery of possession and retention of title till the price is paid. Obviously the buyer has every right of ownership consistent with the seller's retention of security for the price. That security is the measure of the seller's right. The transaction is exactly the same in legal effect as a transfer of title and a mortgage back for the price, and the intent of the parties is the same. No further act on the part of the seller is expected to take place at a future day. By refusing to receive the money due he could not repudiate the transaction, rendering himself liable to a personal action alone.<sup>2</sup> The trans-

will take cognizance, and that the vendee's equitable title arises at the time when, by agreement, he was to have the legal title.

<sup>1</sup> *Dowdy v. McLellan*, 52 Ga. 408. In this case it was held that the maker of a promissory note given for a reversionary interest in slaves was not relieved from liability by the emancipation of the slaves. Such cases are rare in sales of personal property.

<sup>2</sup> In *Carpenter v. Scott*, 13 R. I. 477, 479, speaking of such a sale, the court said: "Under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee, or, in the event that he has sold or mortgaged it, in his vendee or mortgagee, without further bill of sale. *Day v. Bassett*, 102 Mass. 445, 447; *Crompton v. Pratt*, 105 Mass. 255, 248; *Currier v. Knapp*, 117 Mass. 324, 325, 326; *Chase v. Ingalls*, 122 Mass. 381, 383."

In *Chicago Railway Equipment Company v. Merchants' Bank*, 136 U. S. 268, 283, while referring to notes each of which contained a statement that it was given for personal property the title to which should remain in the payee until the note was paid, Harlan, J., who delivered the opinion of the court, said: "The agreement that the title should remain in the payee until the notes were paid . . . is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid. . . . The suggestion that the maker could not have been compelled to pay if the cars had been destroyed before the maturity of the notes, is without any foundation upon which to rest. The agreement cannot properly be so construed. The cars having been sold and delivered to the maker, the payee



action is, therefore, rather executed than executory, and, what is the important point, is so regarded by the parties. The loss accordingly should fall on the buyer.

A sale of goods with an option on the part of the buyer to return, as the title and all beneficial interest are transferred, necessarily throws the risk upon the buyer, for the impossibility of performing one half of his alternative promise to return the goods or pay for them cannot excuse non-performance of the other half.<sup>1</sup> On the other hand, when goods are delivered with an option to purchase, as the buyer has never entered into an obligation to buy, the risk necessarily remains with the seller.<sup>2</sup> In England this distinction between a "sale or return" and a "sale on trial," important as it is for the correct decision of many questions, has not been brought out by the decisions.<sup>3</sup>

Still another principle is involved in *Smith v. Hale*, 158 Mass. 178. It was there held that the purchaser of a buggy, the springs of which are warranted, was not precluded from returning it for breach of warranty by the fact that the springs were broken and the buggy was therefore not in the same condition as when it was bought. The decision is correct, for by warranting the springs the seller assumed the risk of injury to them by ordinary use. Had an accidental injury happened to any other part of the buggy, — or indeed to the springs from any other cause than ordinary use, — the loss would, it seems, have fallen upon the purchaser, under the

had no interest remaining in them except by way of security for the payment of the notes given for the price."

The common statutes requiring a conditional sale, like a chattel mortgage, to be recorded, show a general recognition of the similarity of the two transactions.

<sup>1</sup> See *Hotchkiss v. Higgins*, 52 Conn. 205, and cases cited. Compare *Newburger v. Hoyt*, 86 Ga. 508.

<sup>2</sup> *Hunt v. Wyman*, 100 Mass. 198; *Jacob Strauss Saddlery Co. v. Kingman*, 42 Mo. App. 208.

<sup>3</sup> In *Head v. Tattersall*, L. R. 7 Ex. 7, and in *Elphick v. Barnes*, 5 C. P. D. 321, the buyer was held to be under no obligation to pay the price of a horse which, in the one case had been injured, and in the other case had died. The later case seems to have been a case of sale on trial, but in *Head v. Tattersall* the title was apparently intended to pass at once. In neither case was the point discussed. In *Elphick v. Barnes*, a dictum in *Moss v. Sweet*, 16 Q. B. 493, 495, to the effect that in case of a sale with right to return the risk was on the buyer, was explained away by the suggestion that it only applied where the loss was due to the fault of the buyer. Again, in the *Sales of Goods Act*, § 18, Rule 4, no distinction is observed. The same rule of presumption is laid down for a "sale or return" and a "sale on approval." Chalmers in his annotation of the act, however, points out the distinction p. 42. The cases in this country are collected in Benjamin, *Sales* (Am. ed. 1892), pp. 568, 569.



principles discussed in the last paragraph, even though the warranty had in fact been broken.<sup>1</sup>

The development of the law in regard to risk of real property under contract of sale has been entirely apart from the law governing sales of chattels, and has taken place in courts of equity rather than courts of law. The matter was first touched upon by Sir Joseph Jekyll, M. R., who said, "If I should buy an house, and, before such time as by the articles I am to pay for the same, the house be burnt down by casualty of fire, I shall not, in equity, be bound to pay for the house."<sup>2</sup>

The leading case on the subject is *Paine v. Meller*,<sup>3</sup> a decision by Lord Eldon. This was a suit for specific performance. The contract was made on September 1 for a conveyance at Michaelmas. Owing to the seller's failure to make out a good title, the conveyance was not made then, but on December 16th or 17th the parties continued treating with each other, and there was evidence that the defect in the title was remedied to the buyer's satisfaction. On December 18th the house was burned. Lord Eldon held that if the buyer had accepted the title he was bound to complete the purchase, but otherwise not. The case is generally cited as a decision that the buyer is liable from the date of the contract, and it seems that such is the effect of it, though it has been cited also as

<sup>1</sup> See *McKnight v. Nichols*, 147 Pa. 158.

<sup>2</sup> *Stent v. Bailis*, 2 P. Wms. 217, 220. The case of *Cass v. Rudele*, 2 Vernon, 280, s. c. Eq. Cas. Ab. 25, pl. 8, is not in point, because according to the reports the houses in question were destroyed after the purchaser was in default, and, according to a note in the latter report, after conveyance. There is also a whole series of cases which should be distinguished. *White v. Nutt*, 1 P. Wms. 61, may be taken as an instance. That was a suit to enforce a contract to purchase an estate for two lives. Before the time for conveyance one of the lives determined. Specific performance was decreed. This clearly follows from the nature of the contract. The contingency the happening of which lessened the value of the estate was an ordinary one necessarily in the contemplation of the parties. An agreement for the purchase of an annuity is subject to a similar risk. *Mortimer v. Capper*, 1 Bro. C. C. 156. Cf. *Pope v. Roots*, 1 Bro. P. C. 370. On the same principle, the case of *Akhurst v. Jackson*, 1 Swanst. 85, is entirely right. There a trader agreed to take two persons in partnership for a period of eighteen years, in consideration of a sum payable in several instalments. Five months later, when only one instalment had become due, the trader became bankrupt. It was held that his assignees were entitled to recover the remaining instalments when they became due. Such cases do not differ in principle from appreciation or depreciation in the market value of property between the days of contract and conveyance, and do not fall properly within the subject of this article, which relates to risks not only accidental, but extraordinary.

<sup>3</sup> 6 Ves. 349.

deciding the contrary.<sup>1</sup> As the time for performance had passed, owing to the seller's default, the buyer could clearly not be compelled to take the property unless this default was waived, and it was for this reason that Lord Eldon made the question turn on the acceptance of the title. His language makes his view clear: "As to the mere effect of the accident itself, no solid objection can be founded upon that simply; for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his; they may be assets; and they would descend to his heir."

Since the decision of *Paine v. Meller* it has not been doubted in England that the buyer is not excused from fulfilling his promise to purchase by an accidental injury to the property.<sup>2</sup> It is not surprising that the English law has had a marked effect upon the decisions in this country. A majority of the courts which have dealt with the subject have, either in dicta or decisions,<sup>3</sup> indicated

<sup>1</sup> A Brief Survey of Equity Jurisdiction, C. C. Langdell, 1 HARVARD LAW REVIEW, 375, note 1. "Lord Eldon held that the vendee must bear the loss, provided he had been put in default by the vendor before the loss happened, but not otherwise." The vendee could hardly be considered in default on any view. Though it rested with him to make the deeds, he would certainly not be in default immediately upon expressing himself as satisfied with the title. He would have a reasonable time thereafter to prepare the deeds, and in fact it was said when the title was accepted that the deeds would be ready in two or three days, a time which had not expired at the time of the fire.

<sup>2</sup> There are dicta to this effect in *Rawlins v. Burgis*, 2 Ves. & B. 382, 387; *Harford v. Purrier*, 1 Mad. 532, 539; *Acland v. Gaisford*, 2 Mad. 28, 32; *Robertson v. Skelton*, 12 Beav. 260, 266; *Coles v. Bristowe*, L. R. 6 Eq. 149, 159, 160. In *Poole v. Adams*, 12 Weekly Rep. 683, *Kindersley* held, at suit of a *cestui que trust*, that a vendee from the plaintiff's trustee was bound to pay the price for an estate though the house had been destroyed, and could not claim the benefit of insurance money collected by the trustee and under agreement with the vendee allowed as part payment of the price, the trustee having misapplied the insurance money and become bankrupt. In *Rayner v. Preston*, 14 Ch. D. 297, it was held that a vendee of a house who after its destruction by fire before the time fixed for conveyance had paid the price in full, could not recover insurance money collected by the vendor. This decision was affirmed by the Court of Appeal, *Brett and Cotton, L. JJ., James, L. J., dissenting*. Thereafter in *Castellain v. Preston*, 8 Q. B. D. 613, 11 Q. B. D. 380, the Court of Appeal, reversing the decision of *Chitty, J.*, unanimously held the insurers entitled to recover back the insurance money paid, on the ground that it was paid in ignorance of the fact that the vendee had previously paid the price in full. In both cases all the judges recognized the doctrine of *Paine v. Meller*.

<sup>3</sup> *Osborn v. Nicholson*, 13 Wall. 654, 660 (but see *The Tornado*, 108 U. S. 342, 352, where *Wells v. Calnan*, 107 Mass. 514, was cited with approval); *Willis v. Wozencraft*, 22 Cal. 607, 618; *Hough v. City Fire Ins. Co.*, 29 Conn. 10; *Lombard v. Chicago Sinai Cong.*, 64 Ill. 477, 482; *Kuhn v. Freeman*, 15 Kan. 423; *Gammon v. Blaisdell*, 45 Kan. 221; *Johnston v. Jones*, 12 B. Mon. 326; *Calhoon v. Belden*, 3 Bush, 674; *Marks v.*



their assent to Lord Eldon's view. But there is, nevertheless, a strong dissent.<sup>1</sup>

The reason stated in the case for what may be called the English view is variously put. It is sometimes said that equity regards as done what is agreed to be done; sometimes that from the moment of the contract the vendor is trustee for the vendee; sometimes that from that moment the vendee is the owner in equity. So far as these statements are not question-begging ways of saying the law is so because it is, they involve the idea that the vendee from the time of the contract acquires the substantial rights of ownership, and will therefore be treated by equity as having the rights and being subject to the liabilities of a legal owner. There are reasons for this theory when applied to real estate not applicable to chattels. That a contract to sell chattels without transfer of possession gives only a personal right against the seller for damages in case of breach has already been shown. A contract to sell real estate, however, may be specifically enforced against the vendor; and not only against the vendor, but against any one who, with notice of the vendee's rights, takes title from the vendor. In this country, moreover, by recording his contract, the vendee is able to charge every one with constructive notice of his rights. He thus acquires in fact a right *in rem*.<sup>2</sup> This effect of the

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Tichenor, 85 Ky. 536; Martin v. Carver's Adm. (Ky.) 1 S. W. Rep. 199; Brewer v. Herbert, 30 Md. 301; Blew v. McClelland, 29 Mo. 304, 306; Snyder v. Murdock, 51 Mo. 175, 177; Walker v. Owen, 79 Mo. 563; Gilbert v. Port, 28 Ohio St. 276, 292; Richter v. Selin, 8 S. & R. 425, 440; Morgan v. Scott, 26 Pa. 51; Siter's App., 26 Pa. 178, 180; Reed v. Lukens, 44 Pa. 200; Hill v. Cumberland Co., 59 Pa. 474, 478; Miller v. Zufall, 113 Pa. 317, 325; Huguenin v. Courtenay, 21 S. C. 403, 405; Christian v. Cabell, 22 Gratt. 82, 105. A decision to the same effect in Australia is Smith v. Hayles, 3 Victorian L. R. Law, 237.

<sup>1</sup> Cutcliff v. McAnally, 88 Ala. 507, 512; Gould v. Murch, 70 Me. 288; Thompson v. Gould, 20 Pick. 134; Gould v. Thompson, 4 Met. 224; Wells v. Calnan, 107 Mass. 514; Wilson v. Clark, 60 N. H. 352; Powell v. Dayton, &c. R. R. Co., 12 Ore. 488. The question is expressly left open in Wetzler v. Duffy, 78 Wis. 170. In New York there are dicta in a few early cases in accord with the English law, Rood v. New York, &c. Co., 18 Barb. 80, 83; McKechnie v. Sterling, 48 Barb. 330, 335; Clinton v. Hope Ins. Co., 45 N. Y. 454, 465; but in view of the later decisions it seems probable that the vendee would not be bound to fulfil his contract if the property were accidentally destroyed or seriously injured before the time for the completion of the contract, unless he had by the contract a right to the possession of the premises. Wicks v. Bowman, 5 Daly, 225; Smith v. McCluskey, 45 Barb. 610; Goldman v. Rosenberg, 116 N. Y. 78; Listman v. Hickey, 65 Hun, 8.

<sup>2</sup> Another instance of the same effect of the system of registration is found in the law of equitable easements. In this country, as every one has constructive notice of a recorded equitable easement, such an easement is as completely a right *in rem* as a legal easement, which also only becomes a right *in rem* when recorded.



registration laws has never been adverted to in connection with the question under discussion, but it seems obvious that the right of the vendee between the time of the contract and the time for performance corresponds more nearly to actual ownership where such laws prevail than where they do not.

If the promise of the vendee is expressly conditional upon receiving a conveyance of the property in good condition, it can hardly be doubted that no liability will arise unless the condition is complied with. If there is no express condition to the vendee's promise, but an express promise by the vendor to convey and deliver in good condition, it is held in Kentucky that failure to comply with the promise, though excused by impossibility, will prevent any right of action for the price.<sup>1</sup> Reasonable as this doctrine seems, it leads to the destruction of the whole English rule, for a promise to convey must always mean a promise to convey in substantially the same condition as at the time of the contract.

On any view, too, the vendor is not entitled to the price unless at the time of the calamity the obligation of the vendee to take the property was absolute. If, therefore, the vendor had not at that time a good title,<sup>2</sup> or was in default,<sup>3</sup> or if either the vendor or the vendee had any option in regard to performance of the contract,<sup>4</sup>

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<sup>1</sup> Marks *v.* Tichenor, 85 Ky. 536, 538. Indeed, it has been held in Indiana that such a promise binds the promisor to pay damages. *Goddard v. Bebout*, 40 Ind. 114. But see *Maggort v. Hansbarger*, 8 Leigh, 532; *Warner v. Hitchins*, 5 Barb. 666; *Young v. Leary*, 135 N. Y. 569. Similarly, a promise to return leased personal property in good condition has been held to amount to an assumption of the risk. *Harvey v. Murray*, 136 Mass. 377. It may be doubted whether this is the true construction of the promise. The contrary decisions of *Seevers v. Gabel* (Ia.), 62 N. W. Rep. 669; *Young v. Bruces*, 5 Litt. 324; *McEvers v. The Sangamon*, 22 Mo. 187; and *Harris v. Nicholas*, 5 Munf. 483, seem better.

<sup>2</sup> *Paine v. Meller*, 6 Ves. 349; *Calhoon v. Belden*, 3 Bush, 674; *Christian v. Cabell*, 22 Gratt. 82.

<sup>3</sup> *Paine v. Meller*, 6 Ves. 349.

<sup>4</sup> *Counter v. Macpherson*, 5 Moo. P. C. 83; *Lombard v. Chicago Sinai Cong.*, 64 Ill. 477; *Blew v. McClelland*, 29 Mo. 304; *Gilbert v. Port*, 28 Ohio St. 276. On this principle the decision in *Goldman v. Rosenberg*, 116 N. Y. 78, would clearly have been the same had the court admitted the general doctrine of the English courts of equity. One partner had conveyed real estate to a firm of which he was a member, agreeing to purchase it on the expiration of the partnership. As the property was at the risk of the business, the right of the vendee was subject to a contingency. For the same reason, a judicial sale does not throw the risk on the vendor until the sale is confirmed, for though the vendee is bound before that time, the vendor is not, since the court may refuse to confirm the sale. *Ex parte Minor*, 11 Ves. 559; *Twigg v. Fifield*, 13 Ves. 517.

the loss falls upon the vendor. So too if the loss was due to the vendor's own negligence.<sup>1</sup>

It has not been considered whether partial destruction of an estate stands on any different footing from total destruction, but no such distinction seems tenable. On any true construction of a promise to convey an estate, the promise is no more fulfilled by conveying the land without the house than by conveying nothing. And any reasoning which requires the vendee to pay when the vendor materially though excusably fails to fulfil his promise must require payment when the vendor totally and equally excusably fails to perform. In a Kansas decision<sup>2</sup> the question of total destruction seems involved. In that case the estate was taken by eminent domain so that the vendor could convey nothing at all. It was held that the vendee must pay the price, becoming thereby of course entitled to the damages payable on account of the taking.

In jurisdictions at least where equitable defences and replications are allowed at law, there should be no difference in the effect of a decision on this point by a court of law and a decision of a court of equity. If the promise of the buyer is made expressly conditional on receiving the property in good order, a court of equity can disregard the expressed intent of the parties no more than a court of law. On the other hand, if the promise of the buyer is in terms absolute, this promise should not be held in a court of law subject to an implied condition of performance by the seller, if the contrary is held by a court of equity. The basis of implied conditions is that there is a failure of the consideration for a promise if the performance promised in return is not given. Whether there has been such a failure of consideration is a question which should be decided in the same way by a court of law and a court of equity. If it is proper for a court of equity to hold that a vendee before conveyance is in the owner in equity and hence liable for the price, a court of law should hold either that there are no implied conditions that the legal title to the property shall be transferred, and that the property shall be in substantially the same state, or that, if there are such conditions, accidental destruction or injury of the property is an excuse for non-performance. In fact, though most of the decisions holding the vendee not liable have been made by courts of law, and all the contrary decisions by courts of equity or by courts administering both law and equity, it is not probable that

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<sup>1</sup> Marks *v.* Tichenor, 85 Ky. 536, 538.

<sup>2</sup> Gammon *v.* Blaisdell, 45 Kan. 221.



the result of the former cases at least would have been different had the proceedings been in equity. It is nearly certain that the courts of Massachusetts, Maine, and New Hampshire would give vendors no more relief in equity than at law.<sup>1</sup>

In support of the proposition forcibly stated by Lord Eldon, "The estate from the sealing of the contract is the real property of the vendee,"<sup>2</sup> it is pointed out that from that time the property may be conveyed or devised as real estate by the vendee,<sup>3</sup> that it will pass to his heir,<sup>4</sup> that his widow will get dower if dower in equitable estates is allowed,<sup>5</sup> that his family may acquire rights of homestead at once,<sup>6</sup> that the vendor if still in possession must take reasonable care of the property and is liable for waste,<sup>7</sup> that the vendor's creditors cannot reach the real estate,<sup>8</sup> that on the other hand the vendor's interest is immediately treated as personalty<sup>9</sup> and passes to his executors, his wife not having dower,<sup>10</sup> that under the old English law the contract was in equity regarded as a revocation of a prior devise,<sup>11</sup> and under the modern English and Ameri-

<sup>1</sup> In *Poole v. Adams*, 12 W. R. 683, Kindersley, V. C., said: "Whatever the rule of this court might be as to enforcing specific performance in a case where the property was burnt down, it was clear that the contract remained good at law, and that the purchaser might have been sued for breach in refusing to complete and pay his purchase money." This is not the usual line of argument, however.

<sup>2</sup> *Seton v. Slade*, 7 Ves. 265, 274.

<sup>3</sup> The vendee's interest was held to pass under a devise of the testator's freehold estate. *Greenhill v. Greenhill*, 2 Vern. 679; *Prec. Ch.* 320. See also *Langford v. Pitt*, 2 P. Wms. 629.

<sup>4</sup> *Langford v. Pitt*, 2 P. Wms. 629; *Seton v. Slade*, 7 Ves. 265, 274; *Musham v. Musham*, 87 Ill. 80; *Champion v. Brown*, 6 Johns. Ch. 398; *Hathaway v. Payne*, 34 N. Y. 92, 103; *Thomson v. Smith*, 63 N. Y. 301, 303.

<sup>5</sup> *Bailey v. Duncan's Repr.*, 4 Mon. 256; *Rowton v. Rowton*, 1 Hen. & Munf. 92.

<sup>6</sup> *Chopin v. Runte*, 75 Wis. 361. In this case the vendee had possession, and it may be doubted whether the same result would otherwise have been reached.

<sup>7</sup> *Phillips v. Silvester*, L. R. 8 Ch. 173; *Earl of Egmont v. Smith*, 6 Ch. D. 469; *Royal Society v. Bomash*, 35 Ch. D. 390; *Clarke v. Ramuz* [1891], 2 Q. B. 456; *Holmberg v. Johnson*, 45 Kan. 197. Compare *Hellreigel v. Manning*, 97 N. Y. 56. See also *Dart, Vendors and Purchasers* (6th ed.), 733; *Cloyd v. Steiger*, 139 Ill. 41.

<sup>8</sup> *Finch v. Earl of Winchelsea*, 1 P. Wms. 277; *Jackson v. Snell*, 34 Ind. 241; *Hampson v. Edelen*, 2 Har. & J. 64; *Houston v. Nowland*, 7 G. & J. 480; *Lane v. Ludlow*, 6 Paige, 316, n.; *Moyer v. Hinman*, 13 N. Y. 180, 190; *Siter's Appeal*, 26 Pa. 178; *Blackmer v. Phillips*, 67 N. C. 340.

<sup>9</sup> *Curre v. Bowyer*, 5 Beav. 6, n. (b); *Thomas v. Howell*, 34 Ch. D. 166; *Moore v. Burrows*, 34 Barb. 173; *Smith v. Gage*, 41 Barb. 60; *Thomson v. Smith*, 63 N. Y. 301, 303; *Keep v. Miller*, 42 N. J. Eq. 100; *Kerr v. Day*, 14 Pa. St. 112, 114. And see a valuable note in 42 N. J. Eq. 100.

<sup>10</sup> *Lunsford v. Jarrett*, 11 Lea, 192, 196.

<sup>11</sup> *Cotter v. Laver*, 2 P. Wms. 623; *Knollys v. Alcock*, 5 Ves. 648, 654; *Bennett v. Lord Tankerville*, 19 Ves. 170, 178; *Farrar v. Earl of Winterton*, 5 Beav. 1; *Re Manchester Co.*, 19 Beav. 365.



can law the devisee or heir being compelled to convey to the purchaser, though the price is paid to personal representatives,<sup>1</sup> that in insurance law the vendee is regarded as the owner,<sup>2</sup> and finally in a multitude of cases the vendor is said to be trustee for the vendee.<sup>3</sup>

Most of these decisions are entirely explicable on the ground of equitable conversion. The vendor has indicated an intent to convert his real estate into personalty, and the vendee an intent to convert personal estate into real estate, and there is no reason why the intent should not be regarded. The question is not ordinarily at what time the conversion is to be dated, but whether there is any conversion. Where the former question arises, it is noticeable that the profits of land under contract of sale belong to the vendor's heir until the day fixed for conveyance.<sup>4</sup> Unquestionably the vendee has an interest in the property which equity will and should protect by enjoining if necessary any dealing with the property inconsistent with the contract. It should be equally clear that the vendor has likewise an interest in the property, and, if the vendee is in possession, he also may be enjoined from committing waste.<sup>5</sup> Many of the insurance cases seem inexplicable on any view, and it is not true that the vendor is trustee for the vendee,<sup>6</sup> and this is

<sup>1</sup> *Watson v. Mahan*, 20 Ind. 223; *Judd v. Mosely*, 30 Ia. 423; *Newton v. Swazey*, 8 N. H. 9; *Moore v. Burrows*, 34 Barb. 173; *Newport Waterworks v. Sisson* (R. I.), 28 At. Rep. 336.

<sup>2</sup> A policy of insurance issued to the vendee was held valid, though the policy was conditioned to be void unless the insured had the entire, unconditional, and sole ownership. *Rumsey v. Phoenix Ins. Co.*, 17 Blatch. 527; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; *Pelton v. Westchester Fire Ins. Co.*, 77 N. Y. 605; *Millville Fire Ins. Co. v. Wilgus*, 88 Pa. 107; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. 460; *Elliott v. Ashland Mut. Ins. Co.*, 117 Pa. 548. See also *Hough v. City Ins. Co.*, 29 Conn. 10. And see *Biddle on Insurance*, § 686. But in all these cases the vendee had possession, and this is strongly relied on as a ground of decision.

<sup>3</sup> See notes 7 and 8, *infra*.

<sup>4</sup> *Lumsden v. Fraser*, 12 Sim. 263.

<sup>5</sup> *Moses v. Johnson*, 88 Ala. 517; *Miller v. Waddingham*, 91 Cal. 377.

<sup>6</sup> "An unpaid vendor is a trustee in a qualified sense only, and is so only because he has made a contract which a court of equity will give effect to by transferring the property sold to the purchaser." *Rayner v. Preston*, 18 Ch. D. 1, 6, per Cotton, L. J.

"With the greatest deference it seems wrong to say that one is a trustee for the other. The contract is one which a court of equity will enforce by means of a decree for specific performance. But if the vendor were a trustee of the property for the vendee, it would seem to me to follow that all the product, all the value of the property received by the vendor from the time of the making of the contract ought, under all circumstances, to belong to the vendee. What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on

occasionally recognized, yet the courts continue the use of this misleading word.<sup>1</sup>

In determining the propriety of throwing the risk on the purchaser from the date of the contract, the primary question is not, it should be observed, whether the vendor or the vendee may be called owner with the greater propriety pending performance of the contract, still less whether the vendee may be called owner in equity and the vendor a trustee. The vendee, when sued, is sued on a promise to pay money. This promise he gave in return for a counter promise. Unless a fundamental principle of the law of

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two conditions; first of all, whether the title is made out, and, secondly, whether the money is ready; and unless those two things coincide, at the time when the contract ought to be completed, then the contract never will be completed, and the property never will be conveyed. But suppose at the time when the contract should be completed, the title should be made out and the money is ready, then the conveyance takes place. Now it has been suggested that when that takes place, or when a court of equity decrees specific performance of the contract, and the conveyance is made in pursuance of that decree, then by relation back the vendor has been trustee for the vendee from the time of the making of the contract. But again, with deference, it appears to me that if that were so, then the vendor would in all cases be trustee for the vendee of all the rents which have accrued due, and which have been received by the vendor between the time of the making of the contract and the time of completion; but it seems to me that that is not the law. Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of the making of the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase, of which a court of equity will under certain circumstances decree a specific performance." *Rayner v. Preston*, 18 Ch. D. 1, 18, per Brett, L. J. See also criticism of this use of the word trustee in 36 Sol. Journal, 775 and 784. It has been suggested that when the purchase-money has been paid the vendor may be properly called a trustee. 2 HARVARD LAW REVIEW, 421. It is submitted that even then the vendor is not a bare trustee for the vendee, unless by the contract the vendee is entitled to immediate possession. And except in that case the risk should remain with the seller. Of course where the price is paid the vendee is ordinarily entitled to immediate possession, but this is not necessarily the case.

<sup>1</sup> In *Royal Society v. Bomash*, 35 Ch. D. 390, 397, Kekewich, J., says: "Of course we all know that he is only a trustee in a modified sense. There are many things to be done before he becomes a mere trustee; but still Lord Selborne (in *Phillips v. Silvester*, L. R. 8 Ch. 173, 177) says he is a trustee, and I have no doubt that that is the right position, and I so decide."

It would seem that a trustee only in a modified sense would better be called by some other name, — the name of vendor, for instance.

How little weight is to be given to the loose language used in this matter is shown by the fact that it is common to find it also said that the vendee is trustee of the purchase money, or the vendor is owner of it in equity. Two recent illustrations of this in quarters where it might not have been expected may be found in *Cross v. Bean*, 83 Me. 61, 64, and in *Pomeroy's Equity Jurisprudence*, § 368. And see *Fry, Spec. Perf.* (3d ed.), § 1396. In Maine, though it is said in *Cross v. Bean* that vendor and vendee are trustees for each other, it is also held in the strongest way that the risk is on the vendee. *Gould v. Murch*, 70 Me. 288.



contracts—a principle founded on natural justice—is to be set aside, the vendee cannot be called upon to perform his promise unless the vendor performs his counter promise, in substance at least, and it matters not that non-performance of the counter promise is excused by the impossibility of performance.<sup>1</sup> The vendor contracted to give a complete legal title, with all which that implies,—the right to dispose of the property, *jus disponendi*, and the right of present enjoyment thereof, *jus fruendi*. Unless the vendee acquires by the contract itself substantially this, it is at variance with sound legal principles to hold him liable on his own promise after destruction of the premises. It does not advance the argument to discuss equitable ownership unless it be also considered how far that is the equivalent of the legal ownership for which the vendor contracted. In the United States, at least, the vendee does by the contract itself, as soon as it is recorded, acquire the full *jus disponendi*, the substantial equivalent of a legal reversionary interest from the time when performance is due. In England he does not get nearly as much as this, for the vendor may by selling to a *bona fide* purchaser for value without notice deprive the vendee of all right to the property. If the vendor wishes to do this, it is perfectly easy for him to do it. The vendee's right, therefore, is wholly dependent on the honesty of the vendor. Such a right is not the substantial equivalent of a legal title. Moreover, neither in the United States nor in this country does the vendee acquire by the contract the second great incident of ownership,—the right of present enjoyment. This may be a matter of great importance. If the contract is to convey at a day far in the future, it seems impossible to say in any sense that the vendor receives at the moment of the contract the equivalent of what he bargained for. If the day fixed for conveyance is near at hand, it is true, the possession is of less importance, but it is still to be considered, and a rule which is laid down as a general one must be able to stand the strain of hard cases.

Though the arguments presented in the preceding paragraph are important, they do not touch the fundamental difficulty with the English rule, which is, that, whatever rights a vendee may acquire immediately after the contract, and even if such rights were the substantial equivalent of a legal title, the contract is for the

<sup>1</sup> Taylor v. Caldwell, 3 B. & S. 826; Jackson v. Union Marine Ins. Co., L. R. 10 C. P. 125; Poussard v. Spiers, 1 Q. B. D. 410; Greene v. Linton, 7 Porter, 133; Remy v. Olds (Cal.), 34 Pac. Rep. 216; Johnson v. Walker, 155 Mass. 253.



transfer of title at a future day. It is only by the transfer at that time that such a contract is fulfilled. Of course, voluntary acceptance of a proffered equivalent at an earlier day would be sufficient to bind the vendee; but where the original intention of the parties to transfer ownership from one to the other at a future day has never been changed, nothing but transfer at that day is a fulfilment of the contract. It should be obvious that a present purchase of the reversion of an estate is a different thing from an executory contract to purchase an estate at a future day. It should be obvious that the intention of the parties is different in the two cases. It is, therefore, in clear disregard of the intention of the parties to hold that, since a court of equity assures to the purchaser in the latter case, to a greater or less extent, a right substantially equivalent to that secured by the purchaser, of a legal future estate, the loss should be similarly adjusted. The intention of the parties is the chief factor in any proper decision. It would be universally admitted that, if the contract expressly provided that the risk should be with one party or the other, this provision would be of controlling force. Parties do not frequently make such express provisions, but they do indicate whether they intend a present transfer of the rights of ownership or a future transfer, and there should be no doubt that they expect all the incidents of ownership, including risk to pass from the seller to the buyer at that time. That time will frequently not be when the legal title is transferred. If, as frequently happens, a purchaser is given immediate possession under his contract, the title is retained merely as security for payment of the price. It is a short way of accomplishing the same end as would be achieved by conveying to the purchaser and taking a mortgage back, as was suggested in regard to similar transactions in sales of personal property. When by the contract the beneficial incidents of ownership are to pass is the time which the parties must regard as the moment of the transfer.

How little the intention of the parties is regarded by the English rule may be seen by comparing a contract to sell a carriage-horse at the end of the season and a contract to sell a race-horse at the end of the season. Equity would grant specific performance of the latter contract, and hence, while the seller sends the animal over the country to race for his own benefit, he would, according to the English rule, do so at the risk of the buyer.<sup>1</sup> The carriage-

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<sup>1</sup> No cases seem to have arisen in regard to risk under contracts for the sale of personal property of such a character that the contract would be specifically enforced, but

horse, on the other hand, would remain at the risk of the seller till the end of the season. Surely the intention of the parties as to the time of transfer is the same in both cases. If it be suggested that in both cases the parties contemplate an immediate transfer of ownership, but that in the case of the carriage-horse equity cannot effectuate this intention, in the case of the race-horse it can, the answer is, that if the parties meant a present transfer and lease back during the season they would say so. It would be perfectly easy to express such an intention, and in the case of personalty the intention, if expressed, would be perfectly effectual without any formality.

In truth, the argument for throwing the loss upon the purchaser in an executory contract of sale where possession is not given to the purchaser cannot be put more strongly than this. Equity gives to the vendee, whatever his intention, assurance far greater than a court of law can give, that the specific subject of the sale will become his, and, if not at the time fixed by the contract, yet with damages sufficient to pay for the delay. In return for this assurance equity demands as a price that the vendee take the risks of accidental loss. The propriety of such a requirement depends on the answer to three questions: Is it in accordance with natural justice? Is it of practical advantage? Is it in conformity with the principles of law in analogous cases?

Views of natural justice vary so much that it is not very profitable to discuss the topic, but certainly in dealing with contracts no general rule can be more just than to aim to follow the intention of the parties, and therefore to throw the loss on the vendee if the parties intend a present transfer, on the vendor if they intend a future transfer.<sup>1</sup>

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no possible theory can be suggested for distinguishing such a contract in this connection from a contract to sell real estate.

<sup>1</sup> It is frequently suggested that, as the vendee gets the benefit of any chance improvement of the property, he should therefore suffer for a chance loss. There are several answers to this. In the first place, it proves too much, for it is as applicable to personal property as to real property. In the second place, there are practically no chance improvements analogous to chance destruction. In the third place, it is not certain that the vendee would get the benefit of an advantageous change in the property of such a character as to alter its nature, whether the subject of the sale were realty or personalty. A few analogies suggest themselves. In the case of accession, where the nature of property has been changed by work done upon it, if there has been no wilful conversion, the owner loses his right to the property itself and has only a right to its money value in its original form. *Gray's Cases on Property*, vol. i. pp. 65-104. It is true that in such cases the increased value is due, not to chance, but to



The practical advantages of leaving the risk with the vendor until transfer of possession are obvious. In the first place, it is better in a doubtful case to let a loss lie where it falls. It saves litigation. More important than this principle is the consideration that it is wiser to have the party in possession of property care for it at his peril, rather than at the peril of another. Of course, if the vendor in possession is negligent, and owing to his negligence the property is injured or destroyed, as matter of law the loss is his on any view, but there may be a great difference between not being so negligent as to be liable, and taking such care as would be induced by a great personal stake in the consequences. Then, too, negligence of a vendor in possession is a very difficult thing to prove, and the burden of proving it under the English rule is upon the vendee. A further consideration is the arrangement of the insurance. If the contract immediately throws the risk on the vendee, it practically removes it from an insurer of the property, for the vendor's insurable interest becomes only that of a mortgagee; so that, even if the insurer were forced to pay the vendor, he would be subrogated to the claim of the latter against the vendee. This can hardly be thought a happy result, yet it is one likely to happen after any contract of sale. The vendor ordinarily has insurance at the time of the contract. The vendee can have none, for till after that time he has no insurable interest. In fact, the vendee relies on the vendor's insurance as a protection to the

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work of the defendant or some one from whom he claims. Nevertheless, the fact remains that the plaintiff had a right to a specific thing against one in possession of it, and lost that right because of the change in its nature and value, and it is this change which is the gist of the defence. On the other hand, it may be suggested that the young of animals which the owner had contracted to sell would presumably pass to the buyer, *partus sequitur ventrem*. *Santos v. Illidge*, 6 C. B. N. S. 841, 852; *Buckmaster v. Smith*, 22 Vt. 203; *Clark v. Hayward*, 51 Vt. 14. But in case of an agreement to sell a specific animal, or perhaps even a herd, at a future day, this is open to doubt. If the buyer was held entitled to the young, it would be because of a maxim in the Roman law, which, as it threw all risks on the buyer, necessarily gave him all profits. Moreover, the maxim related primarily to status rather than title. In 2 Kent's Com. 361, the learned author says: "If a person hires for a limited period a flock of sheep or cattle of the owner, the increase of the flock during the term belongs to the usufructuary, who is regarded as temporary proprietor. This general principle of law was admitted in *Wood v. Ash*, Owen, 139, and recognized in *Putnam v. Wyley*, 8 Johns. 432." One who agrees to sell at a future day, retaining in the mean time the *ius fruendi*, should have rights at least equal to a lessee. The case of dividends on shares of stock declared between the day of a contract to sell and the time for delivery or transfer may also be suggested. But dividends are not extraordinary accidental accessions. They are normal incidents, analogous to rents and profits of real estate. To some extent the same may be said of the increase of animals.



property. Even if, as is not infrequently provided, the vendor's insurance is by agreement to be assigned to the vendee when the property is transferred, or to be held for his benefit in the mean time, either the vendor or the vendee is not protected by the English law.<sup>1</sup>

Finally, the doctrine of equity here criticised does not follow the analogy of cases indistinguishable on principle.

In *Taylor v. Caldwell*,<sup>2</sup> the plaintiff had contracted with the defendant for the hire of a music hall for several specified days. The hall was burned before the time. The action was brought against the owner for damages. The trial court directed a verdict for the plaintiff, but a rule to enter a verdict for the defendant was made absolute. Blackburn, J., at the end of an elaborate opinion, said: "We think, therefore, that the music hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the hall and gardens and other things."<sup>3</sup> It is true the agreement could not have been specifically enforced as a whole, because the defendant had agreed to provide certain things necessary for the proposed entertainments besides the hall; but the principle is stated as a general one, and the case has become a leading authority for similar cases. It has not been suggested that the principle does not apply to a contract that might have been specifically enforced owing to the nature of the property to which it related.

The decisions in regard to interest on the purchase money and the rents and profits of the land are inconsistent both with the doctrine that the contract itself makes the vendee owner in equity, and with the doctrine that the vendor is invariably to be regarded as the owner until the transfer of the legal title.

It is well settled that the vendor is not entitled to immediate

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<sup>1</sup> "The common practice of inserting in conditions of sale that the purchaser shall have the benefit of any insurance effected by the vendor exposes the vendor to the danger of having to hand over the insurance money to the purchaser, and at the same time of being liable to the insurance company for an equivalent amount of his purchase money." Dart, *Vendors and Purchasers* (6th ed.), p. 913; see also p. 197. The purchaser is not, without agreement, entitled to the insurance of the vendor. *Poole v. Adams*, 12 W. R. 683; *Rayner v. Preston*, 18 Ch. D. 1; *King v. Preston*, 11 La. An. 95; *Clinton v. Hope Ins. Co.*, 45 N. Y. 454, 465. *Gilbert v. Port*, 28 Ohio St. 276; *Reed v. Lukens*, 44 Pa. 200, *contra*. See also *Hill v. Cumberland Valley Co.*, 59 Pa. 474; *Parcell v. Grosser*, 109 Pa. 617.

<sup>2</sup> 3 B. & S. 826.

<sup>3</sup> Page, 840.

possession, unless the contract expressly provides that he shall have it;<sup>1</sup> nor is he entitled to the rents and profits until the time when he is entitled to possession.<sup>2</sup> This cannot be reconciled with immediate ownership on the part of the vendee. Where the contract specifies a fixed day for the transfer of title, it might be contended that the intent of the contracting parties was thereby indicated, that the vendee should retain the possession and rents and profits till that day. But the law is, presumably, the same whether a day is or is not fixed by the contract for performance,<sup>3</sup> and no argument can be convincing of the propriety of asserting that the vendor is an owner from the making of the contract, and yet is not entitled to the rights of an owner though he has not agreed to surrender them. If an intent is manifest that the vendee shall not have possession or rents and profits, an intent is equally manifest that he shall have no other right or consequence of ownership.

On the other hand, from the time when the vendee is entitled by the contract to possession, he is entitled to the rights of an owner. The vendor, if still in possession, must account for the rents and profits,<sup>4</sup> and the vendee must pay interest on the price.<sup>5</sup> This rule shows that interest on the purchase money and rents and

<sup>1</sup> *Clarke v. Ramuz*, [1891] 2 Q. B. 456, 463; *Gaven v. Hagen*, 15 Cal. 208; *Gates v. McLean*, 70 Cal. 42; *Stratton v. California Land Co.*, 86 Cal. 353; *Williams v. Forbes*, 47 Ill. 148; *Chappell v. McKnight*, 108 Ill. 570; *Druse v. Wheeler*, 22 Mich. 439; *Cartin v. Hammond*, 10 Mont. 1; *Suffern v. Townsend*, 9 Johns. 35; *Erwin v. Olmsted*, 7 Cow. 229; *Spencer v. Tobey*, 22 Barb. 260, 269; *Burnett v. Caldwell*, 9 Wall. 290, 293. The law in Alabama is otherwise, *Reid v. Davis*, 4 Ala. 83; *Wimbish v. Montgomery, &c. Assoc.*, 69 Ala. 575, 578. It has been held in two cases that if the price has been paid and the land is vacant the purchaser is entitled to possession. *Miller v. Ball*, 64 N. Y. 286; *Sherman v. Savery*, 2 Fed. Rep. 505.

<sup>2</sup> *Mackrell v. Hunt*, 2 Mad. 34 *n.*; *Rayne v. Preston*, 18 Ch. D. 1, 11. See also the cases cited in note 4, *infra*. The same principle is also involved in the cases in the preceding note. Compare *Ashurst v. Peck* (Ala.), 14 South. Rep. 541, *Hundley v. Lyons*, 5 Munf. 342.

<sup>3</sup> See, however, *Hundley v. Lyons*, 5 Munf. 342.

<sup>4</sup> *Acland v. Gaisford*, 2 Mad. 28; *Wilson v. Clapham*, 1 J. & W. 36; *Mason v. Chambers*, 3 T. B. Mon. 318; *Baxter v. Brand*, 6 Dana, 296; *Hundley v. Lyons*, 5 Munf. 342; *Dart, Vendors and Purchasers* (6th ed.), pp. 286, 505, 708, 732.

<sup>5</sup> *Powell v. Martyr*, 8 Ves. 146; *Fludyer v. Cocker*, 12 Ves. 25; *Roberts v. Massey*, 13 Ves. 561; *Birch v. Joy*, 3 H. L. C. 565; *Ballard v. Shutt*, 15 Ch. D. 122; *Cullum v. Branch Bank*, 4 Ala. 21; *Boyce v. Pritchett's Heirs*, 6 Dana, 231; *Bishop v. Clark*, 82 Me. 532; *Cleveland v. Burrill*, 25 Barb. 532; *Stevenson v. Maxwell*, 2 Comst. 408; *Ramsay v. Brailsford*, 2 Desaus. 582, 592; *Hundley v. Lyons*, 5 Munf. 342; *Selden v. James*, 6 Rand. 464. A qualification is added in the English cases which would probably meet with general assent, that if the vendee's money is lying idle ready for the vendor, and the vendor has notice of this, interest will cease.



profits are not regarded as equivalent to each other, and therefore that an exchange of them is unnecessary. Further, a vendee in possession has every right of ownership not inconsistent with the security of the vendor,<sup>1</sup> and if the vendor intermeddle with the property he is a trespasser.<sup>2</sup> Until possession or the time when possession should be transferred, therefore, under these decisions, the vendor is treated as the owner, and thereafter the vendee is so regarded.<sup>3</sup>

It is instructive to consider in this connection also the law in regard to leased property. By the early English law it seems clear that even a partial destruction of leased property abated a reserved rent or a part of it proportioned to the injury to the premises.<sup>4</sup> But

<sup>1</sup> *Miller v. Waddingham*, 91 Cal. 377; *Baker v. Bishop Hill Colony*, 45 Ill. 264; *Baldwin v. Pool*, 74 Ill. 97; *Dart, Vendors and Purchasers* (6th ed.), 289.

<sup>2</sup> *Smith v. Price*, 42 Ill. 399.

<sup>3</sup> It may be thought that the rule in regard to rents and profits of real estate is inconsistent with the rule in regard to dividends and calls upon stock after a contract for the sale of stock. It is sometimes said that after such a contract the purchaser is entitled to dividends and must pay calls. In the first place, it is to be noticed that in contracts to sell stock it is generally not specific stock which is the subject of the bargain, but any stock which answers a particular description, and it has not been suggested that it makes any difference whether the contract is to sell specific stock or not. Further, undoubtedly a purchaser of stock may as against the seller be entitled to dividends and liable for calls though the stock has not been transferred to his name, and it is probable that the presumption that an immediate transfer is intended — a presumption which applies to sales of other personal property — applies to sales of stock also. The purchaser is therefore presumably entitled to an immediate transfer, and to all future dividends, and is immediately liable for all calls; but it has not yet been decided that after a contract to sell stock at a future day the purchaser is entitled to dividends and liable for calls and assessments in the mean time. The cases on dividends are collected in *Cook, Stock and Stockholders*, § 539. As to calls, see *Coles v. Bristowe*, L. R. 6 Eq. 149, 4 Ch. 3; *Hawkins v. Maltby*, 4 Ch. 200. The case of calls is somewhat different from that of dividends. Clearly if a purchaser contracts for shares half paid up, he should not be entitled to full paid shares at the same price.

<sup>4</sup> The leading case is *Richards le Taverner's case*, *Dyer*, 56 a: "A man makes a lease for years of land and of a stock of sheep, rendering certain rent, and all the sheep died: it was asked upon the indenture of *Richards le Taverner*, whether this rent might be apportioned? And some were of opinion that it should not, although it is the act of God, and no default in the lessee or lessor; as if the sea gain upon part of the land leased, or part is burned with wildfire, which is the act of God, the rent is not apportionable, but the entire rent shall issue out of the remainder; otherwise is it if part be recovered or evicted by an elder title, then it is apportionable. And of this opinion were *Bromeley*, *Portman*, *Hales*, *Serjeants*, *Luke*, *Justice*, *Brooke* and several of the Temple. But *Marvyne*, *Brown*, *Justices*, *Townshend*, *Griffith*, and *Foster* *e contra*; but all thought it was good equity and reason to apportion the rent. And afterwards this case was argued in the readings by *More* in the following Lent. And it seemed to him, and to *Brooke*, *Hadley*, *Fortescue*



where the lessee expressly covenanted to pay the rent he must keep his covenant, though the leased property suffered injury by accident.<sup>1</sup> In the present century the landlord has been allowed to

and Brown, *Justices*, that the rent should be apportioned because there is no default in the lessee.

The statements in this case as to the effect of gain by the sea or burning by wildfire are cited in the leading case of *Paradine v. Jane*, Aleyn, 26, and frequently since, as authority, but it certainly does not appear what view the majority of the court held.

In Rolle's Abridgment, 236, it is said that if a man leases land and part is surrounded by fresh water, there will be no apportionment because the tenant shall have the fish and may be expected to regain the land. So if the land is burned over by wildfire, but if part of the land is surrounded by salt water, there will be an apportionment, because any one may fish in the water, and there is no reasonable possibility of regaining the land.

The substance of this is repeated in 6 Bacon's Abridgment (6th ed.), 49, 50, and in Chief Baron Gilbert's treatise on Rent, 186, 187 (1758). But see the case of *Paradine v. Jane*, Aleyn, 26, in the following note.

<sup>1</sup> *Paradine v. Jane*, Aleyn, 26, was an action of debt on a lease rendering rent. The defendant pleaded that Prince Rupert, an alien enemy with a hostile army, had expelled him and kept him out of possession. This was held insufficient. "And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him; . . . but when the party by his own contract creates duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore, if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair it. Dyer 33 a, 40 E. 3. 6. h. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations. This reservation then being a covenant in law, and whereupon a covenant hath been maintained (as Rolle said), it is all one as if there had been an actual covenant."

After this it seems not to have been doubted that at least if the tenant had covenanted to pay rent he would not be excused at law. *Monk v. Cooper*, 2 Ld. Ray. 1477; s. c. 2 Strange, 763; *Shubrick v. Salmond*, 3 Burr. 1637, 1640; *Pindar v. Ainsley* (Lord Mansfield, 1763), 1 T. R. 312; *Belfour v. Weston*, 1 T. R. 310; *Baker v. Holtzaffell*, 4 Taunt. 45; *Izon v. Gorton*, 5 Bing. N. C. 501; *Arden v. Pullen*, 10 M. & W. 321. And the law in this country is generally the same. *Osborn v. Nicholson*, 13 Wall. 654, 660; *Warren v. Wagner*, 75 Ala. 188; *Cowell v. Lumley*, 39 Cal. 151; *Robinson v. L'Engle*, 13 Fla. 482; *Coy v. Downie*, 14 Fla. 544; *White v. Molyneux*, 2 Ga. 124; *Lennard v. Boynton*, 11 Ga. 109; *Pope v. Garrard*, 39 Ga. 471; *Peck v. Ledwidge*, 25 Ill. 109; *Smith v. McLean*, 22 Ill. App. 451, 454; *Womack v. McQuarry*, 28 Ind. 103; *Skillen v. Waterworks Co.*, 49 Ind. 193, 198; *Harris v. Heackman*, 62 Ia. 411; *Redding v. Hall*, 1 Bibb 536; *Helburn v. Mofford*, 7 Bush, 169; *Lamott v. Sterett*, 1 Har. & J. 42; *Fowler v. Bott*, 6 Mass. 63; *Kramer v. Cook*, 7 Gray, 550, 553; *Gibson v. Perry*, 29 Mo. 245; *Hallett v. Wylie*, 3 Johns. 44; *Gates v. Green*, 4 Paige Ch. 355; *Patterson v. Ackerson*, 1 Edw. Ch. 96; *Howard v. Doolittle*, 3 Duer, 464; *Graves v. Berdan*, 26 N. Y. 498, 500; *Hilliard v. New York, &c. Co.*, 41 Ohio St. 662; *Harrington v. Watson*, 11 Ore. 143; *French v. Richards*, 6 Phila. 547; *Diamond v. Harris*, 33 Tex. 634; *Cross v. Button*, 4 Wis. 468. But the law is otherwise in South Carolina, *Ripley v.*

recover in an action for use and occupation, though the premises were entirely destroyed;<sup>1</sup> and now it is not likely that much weight would be given in the form of the lease, if it contained no proviso relieving the tenant. In one or two early cases it was intimated that the tenant might have relief in equity from his legal liability,<sup>2</sup> but these cases have been overruled.<sup>3</sup>

In England no distinction is made between partial destruction of the leased premises as where leased land remains after the calamity, and total destruction as where the lease is of a single room or story of a building without land, and the entire building is destroyed. In the latter case, as well as the former, the tenant must pay rent.<sup>4</sup> In this country, however, the tenant is relieved in case of total destruction of the leased premises.<sup>5</sup> It is difficult to see how total

Wightman, 4 McC. 447; Coogan v. Parker, 2 S. C. 255; and perhaps in Kansas, Whitaker v. Hawley, 25 Kan. 674. It is immaterial that the lessor had insurance on the property, and has collected the money and refuses to rebuild. Skillen v. Water Works Co., 49 Ind. 193, 198; Bussman v. Ganster, 72 Pa. 285; Hoy v. Holt, 91 Pa. 88, 90. And if the lessee builds he has no right to the insurance. Ely v. Ely, 80 Ill. 532. See also Leeds v. Cheetham, 1 Sim. 146; Lofft v. Dennis, 1 E. & E. 474.

<sup>1</sup> Izon v. Gorton, 5 Bing. N. C. 501. And see Packer v. Gibbins, 1 Q. B. 421.

<sup>2</sup> In Harrison v. Lord North, Ch. Cas. 83, the plaintiff sought to be relieved from payment of rent for a house which was taken from his possession during the civil war for use as a hospital. For the plaintiff it was argued that this was not like an ordinary case of ouster by a third person, for there was no remedy over. For the defendant it was said: "The plaintiff hath a pitiful case, but not such as this court can relieve, for the law and equity is all one in this case, . . . and cited the case of Carter and Cummins about two years since in this court, where the plaintiff being a tenant of a wharf, which by an extraordinary flood was carried all away, brought his bill to be relieved against paying of his rent, but all the relief he had was only against the penalty of the bond, which was broken for non-payment of rent; and the defendant ordered only to bring debt for his rent . . . The Lord Chancellor (Sir Orlando Bridgeman) took time to advise; but declared if he could he would relieve the tenant."

In Brown v. Quilter, Ambler, 619, Lord Chancellor Northington expressed surprise that it was considered so clear that the landlord could recover rent at law, and said that "when an action is brought after the house is burnt down, there is a good ground of equity for an injunction till the house is rebuilt." The bill was in fact dismissed because the landlord in his answer offered to cancel the lease, and the tenant declined to accept a cancellation. The same Chancellor is said to have proceeded upon the same theory in Camden v. Morton, 2 Eden, 219; and Lord Apsley adopted it in Steele v. Wright, cited in 1 T. R. 708. See also Weigall v. Waters, 6 T. R. 488, 489, per Lord Kenyon.

<sup>3</sup> Hare v. Groves, 3 Anstr. 687; Holtzapfell v. Baker, 18 Ves. 115; Leeds v. Chatham, 1 Sim. 146, 150. See to the same effect Redding v. Hall, 1 Bibb, 536; Harrison v. Murrell, 5 T. B. Mon. 359; Lamott v. Sterett, 1 Har. & J. 42; Hicks v. Parham, 3 Hayw. (Tenn.) 224.

<sup>4</sup> Izon v. Gorton, 5 Bing. N. C. 501.

<sup>5</sup> McMillan v. Solomon, 42 Ala. 356; Ainsworth v. Ritt, 38 Cal. 89; Alexander v. Dorsey, 12 Ga. 12; Womack v. McQuarry, 28 Ind. 103; Shawmut Nat. Bank v. Boston,



destruction of the property leased should have any effect upon a covenant to pay rent if partial destruction has none. The only ground for relieving in the former case is because there has been a failure of consideration. If this is true, it follows that there is a partial failure of consideration in the latter case.

In one case it was intimated that a calamity occurring before the tenant was entitled to possession under the lease, although not causing the total destruction of the property, entitled the tenant to rescind the lease,<sup>1</sup> but this distinction can hardly be supported.

A contract to make a lease should stand on the same footing as a contract to convey a freehold estate, though this is not clearly admitted in the cases.<sup>2</sup>

The distinction between an actual lease and a contract is obvious. In the first case the lessee acquires by the deed an actual legal estate. If that is what he bargained for, it is clear that immediately after the conveyance he has received the consideration for the rent. No further performance is due from the lessor. This would be abundantly clear if rent were customarily paid in a lump sum on execution of the lease, instead of in instalments at stated periods. It is, therefore, not a little odd to find it universally admitted that it is a harsh rule of strict law which requires a tenant

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118 Mass. 125, 128; *Graves v. Berdan*, 39 Barb. 100, 26 N. Y. 498; *Hilliard v. New York, &c.*, 41 Ohio St. 662, 666; *Harrington v. Watson*, 11 Ore. 143, 145; *Hahn v. Baker Lodge*, 21 Ore. 30, 34; *Conn. Mut. Life Ins. Co. v. United States*, 21 Court of Claims, 195, 201. But in Kentucky the English law is followed, *Helburn v. Mofford*, 7 Bush, 169.

<sup>1</sup> *Wood v. Hubbell*, 10 N. Y. 479, 487. Compare *Edwards v. McLean*, 122 N. Y. 302:

<sup>2</sup> In *Bacon v. Simpson*, 3 M. & W. 78, it was held that a plaintiff who contracted to assign a lease of a furnished house could not recover damages from one who contracted to buy it, and refused to perform on account of partial destruction because he himself was not ready to perform. It is true the action was at law, and the lease included personal as well as real property, but the decision is not rested on these grounds. In *Counter v. Macpherson*, 5 Moo. P. C. 83, the landlord agreed to put the premises in repair and put up an additional building. Before this work was completed, the premises were partially burned. The landlord was held not entitled to specific performance because the work was not completed, and this seems a sufficient reason. *Huguenin v. Courtenay*, 21 S. C. 403, was a suit by the seller for specific performance of an agreement for the sale of a lot of land on the shore of an island, the fee of which was nominally in the State, the occupants having legally an estate from year to year and paying as rent one penny annually, but having for practical purposes the absolute ownership. Before the day appointed for transfer of title the sea washed away a portion of the lot. The court, though expressing assent to the doctrine of *Paine v. Meller*, 6 Ves. 349, gave judgment for the defendant, and distinguished the case of a sale of a leasehold estate. On appeal the decision was affirmed. The decision was clearly right on any view, because the agreement was subject to a condition which so far as appeared had not been performed, and the appellate court made, this a secondary ground of decision.



to pay rent when the leased premises are destroyed, — a rule from which it was decided only after some conflict that equity would not relieve, — to find that in New York by statute,<sup>1</sup> and in South Carolina by judicial decisions,<sup>2</sup> a tenant, the actual owner of a legal estate, is relieved from liability by substantial destruction of the premises, and that almost universally in this country total destruction of the leased premises terminates the tenant's liability, and yet to find frequently, in these same jurisdictions, that one who has agreed to buy real estate in the future, though perhaps discharged at law by accidental injury to the property, is regarded by a court of equity as already having such an ownership in the property that he must pay for it. The facts and opinion of the court in *Huguenin v. Courtenay*<sup>3</sup> are suggestive in this connection. The court says, in substance, if a tenant is relieved by destruction of the leased premises, he surely cannot be liable if the premises are destroyed after an agreement to lease in the future; and a lease is a lease though it be for 999 years and whatever the rent; but if, instead of a lease substantially equivalent to a fee, the subject matter of the agreement were in fact a fee, the seller would be entitled to the price.

Doubtless the reason why a tenant is relieved to the extent that he is in case of accidental injury or destruction to the leased premises, is because the parties to a lease are apt to regard it rather as a contract than as a conveyance. "A lease is in one sense a running rather than a completed contract. It is an agreement for a continuous interchange of values between landlord and tenant, rather than a completed contract."<sup>4</sup> If this were granted it would only make a lease analogous to a contract for the sale of real estate, and if the tenant is relieved in the former case, the vendee should be in the latter. Yet the same court which exhibited such tenderness for the lessee as thus to construe a lease has twice decided that a vendee is liable to pay to the vendor the contract price for land

<sup>1</sup> Chap. 345 of Laws of 1860 provides "the lessees or occupants of any building which shall, without any fault or neglect on their part, be destroyed or be so injured by the elements or any other cause as to be untenable and unfit for occupancy, shall not be liable or bound to pay rent to the lessors or owners thereof after such destruction or injury, unless otherwise expressly provided by written agreement or covenant; and the lessees or occupants may thereupon quit and surrender possession of the leasehold premises and of the land so leased or occupied." For the construction of this statute, see *Suydam v. Jackson*, 54 N. Y. 450; *Butler v. Kidder*, 87 N. Y. 98; *Edwards v. McLean*, 122 N. Y. 302.

<sup>2</sup> *Ripley v. Wightman*, 4 McC. 447; *Coogan v. Parker*, 2 S. C. 255.

<sup>3</sup> 21 S. C. 403.

<sup>4</sup> *Whitaker v. Hawley*, 25 Kan. 674, 687, per Brewer, J.

taken by eminent domain before transfer of the property, becoming entitled thereby to damages for the taking.<sup>1</sup> In the later of these two decisions the assessed damages were exactly one-third of the contract price.<sup>2</sup>

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<sup>1</sup> Kuhn v. Freeman, 15 Kan. 423; Gammon v. Blaisdell, 45 Kan. 221. When Kuhn v. Freeman was decided, the eminent judge who wrote the opinion of the court in Whitaker v. Hawley, *supra*, was a member of the court.

<sup>2</sup> A lease of personal property might be thought to approach more closely to a continuing contract, but such leases are rare. In the Southern States leases of slaves were formerly not unusual, and opinion was divided as to whether the loss in case of death fell upon the lessor or lessee. It was held that the lessee was excused from paying the stipulated hire in Collins v. Woodruff, 9 Ark. 463; Dudgeon v. Teass, 9 Mo. 857; Bacot v. Parnell, 2 Bailey, 424; Maldrow v. Wilmington, &c. R. R., 13 Rich. 69; Townsend v. Hill, 18 Tex. 422; George v. Elliott, 2 Hen. & Mun. 5. So emancipation by law was held to relieve the hirer from any obligation to pay rent thereafter. Wilkes v. Hughes, 37 Ga. 361; Mundy v. Robinson, 4 Bush, 342. On the other hand, by other courts it was held that the hirer was not relieved in case of the slave's death: Ricks's Adm. v. Dillahunt, 8 Port. 134; Lennard v. Boynton, 11 Ga. 109; Harrison v. Murrell, 5 T. B. Mon. 359 (see also Redding v. Hall, 1 Bibb, 536; Griswold v. Taylor's Adm., 1 Met' (Ky.) 228; Hughes v. Todd, 2 Duv. 188); Harmon v. Fleming, 25 Miss. 135; Hicks v. Parham, 3 Hayw. (Tenn.) 224; Wharton v. Thompson, 9 Yerg. 45; Dickinson v. Cruise, 1 Head, 258; or emancipation, Coward v. Thompson, 4 Coldw. 442. In all these cases it is to be noticed there was not simply deterioration, but absolute destruction of the leased property. But slaves were an unusual kind of chattel, and it was held that the lease of a slave gave the lessee a property right, an estate in the slave so to speak, for the term of the lease: Smoot v. Fitzhugh, 9 Port. 72; Harmon v. Fleming, 25 Miss. 135; McGee v. Currie, 4 Tex. 217, 222. Specific performance was also granted of contracts relating to them. Murphy v. Clark, 9 Miss. 221; Williams v. Howard, 3 Murph. 74; Horry v. Glover, 2 Hill's Ch. 515; Henderson v. Vaulx, 10 Yerg. 30, 37. Compare Randolph v. Randolph, 6 Rand. 194.

A lease of a furnished house includes personal as well as real property. In Whitaker v. Hawley, 25 Kan. 674, it was held that the absolute destruction of the personal property relieved the tenant from the payment of the rent reserved as a lump sum for both personalty and realty, but it was held otherwise in Bussman v. Ganster, 72 Pa. 285. See also Womack v. McQuarry, 28 Ind. 103; Clinton v. Hope Ins. Co., 45 N. Y. 454. A contract to assign the residue of a term in a furnished house was held excused by the destruction of the premises. Bacon v. Simpson, 3 M. & W. 78.

In the civil law a hiring gives the hirer merely a contractual right, and wherever that system of law prevails, the hirer is excused not simply by the destruction, but also by the injury of the leased property, to an extent proportional to the injury. Hunter's Roman Law (2d ed.), 506, 508. Pothier, Contrat de Louage, sections 138-143; Code Civil Art. 1722, 1 Bell, Comm. (9th ed.) § 1208; Windscheid, Lehrb. des Pandekt. § 400; Code of Louisiana, Art. 2667. The law in Newfoundland seems to be the same, by custom. Broom v. Preston, Sel. Cas. S. C. Mewf. 491 (referred to in Gates v. Green, 4 Paige, Ch. 355). A lease in the civil law is, therefore, analogous to a contract of sale. The civilians who support the doctrine of the Roman law as to risk in contracts of sale, have always been troubled to reconcile the law as to leases. Hofmann seems clearly right in saying that reconciliation is impossible. Periculum beim Kaufe, 18-21.

## A REVIEW OF THE LAW OF SAFE-DEPOSIT COMPANIES.

THE business of conducting public safe-deposit vaults is a comparatively new one in this country, the first of these institutions having been established but about thirty years ago. It was a natural development of the custom that formerly existed among banks of gratuitously according space in their vaults to customers having valuables for which they desired unusual protection.

As soon as vaults were established by incorporated companies as separate institutions, the companies, in offering to the public the protection to be obtained from them, assumed toward their patrons distinct relations and liabilities peculiar to the business from its nature. It has been necessary that these relations and liabilities should be defined and established at law, and the constantly increasing extent of the business and the importance of its position being recognized, it becomes a matter worthy of attention to consider what these are as interpreted by the courts. While the number of cases that have come before them in which safe-deposit companies are primarily involved is singularly small, those adjudicated have at the same time made clear the leading principles applicable to the business.

The important points to be considered may be stated as follows:—

- I. The legal relation between the company and its depositors.
- II. The nature and extent of the liability of the company.
- III. The position and duty of the company in case of legal proceedings against the property of a depositor.
- IV. The relation between depositors having a community of interest in a safe.

### *I. The Legal Relation between the Company and its Depositors.*

This resembles in certain respects two species of relation recognized by law,—those of landlord and tenant and bailor and bailee.

The resemblance to the first exists merely in form, however, suggested by the execution of the contract for hiring of the safe in the shape of a lease. In fact, there can be no relation of land-



lord and tenant between them for two reasons: first, because the contract has nothing to do with real estate. This is shown by the exactly analogous case of an agreement for board and lodging with a designation of the particular rooms to be occupied. In such a case it was held that "the technical relation of landlord and tenant is not created between the parties. The lodger acquires no interest in the real estate. If he is turned out of the rooms before the time expires, he cannot maintain ejectment, and while he remains the hotel-keeper cannot get his pay by distraining as for rent in arrears." *Wilson v. Martin*, 1 Denio, 602; *White v. Maynard*, 111 Mass. 250.<sup>1</sup> The second reason is found in the agreement on the part of the company, either expressed in the contract or implied from the nature of the business, to guard the safe. This agreement fully establishes between the parties the relation of bailor and bailee, and it is this that is recognized by the courts as their legal relation.

In the case of *Roberts v. The Stuyvesant Safe-Deposit Company* (123 N. Y. 57), where the point was specifically passed upon, this is distinctly stated by the court to be the relation between the parties. In defining the liability of the company under it, the court cites the case of *Jones v. Morgan* (90 N. Y. 4). The latter case very aptly illustrates the contract relations and liabilities of the company, from the fact that the nature of the contract upon which action was brought is so entirely similar to that of the one existing between a safe-deposit company and its depositors. It is interesting, therefore, to consider it in detail.

The defendant owned a building in the city of New York. Under an agreement with the plaintiff, who desired to store for safe-keeping certain household furniture, a space was allotted to her in said building, and the defendant assured her that her goods would be safe and would be guarded day and night. The allotted space was enclosed by wooden partitions with a door, upon which were two locks, the key of one of which was kept by the plaintiff. Most of the property was stolen by those in charge of the building. In an action to recover damages, it was held that the contract between the plaintiff and the defendant was one of bailment; that the defendant was liable as warehouseman, and was bound to exercise

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<sup>1</sup> In the last particular, in the case of a safe-deposit company, the mode of procedure against the property of a depositor for arrears of rent is regulated in some States by statute. N. Y., L. 1875, c. 613, art. 15, as amend. 1886, c. 498; Mass., L. 1887, c. 89.

ordinary care and prudence. The defendant contended that the relations between himself and the plaintiff were those of landlord and tenant, and that he was not responsible for property placed in the space leased. This contention was not sustained, on the ground that, when he agreed to guard the space leased, and assured the plaintiff that her property would be safe, he rendered himself liable as bailee. The court, in their opinion by Earl, J., said: —

“It is a species of bailment like that existing in the case of the depositor in a safe-deposit company, who hires a box for his valuables and keeps the key. . . . He may keep the key, but the company, [even] without special contract to that effect, would be held to at least ordinary care in keeping the deposit; and the duty of such care would arise from the nature of the business it was carrying on, and the obligation to discharge it would be implied from the relation between the parties.”

## II. *The Nature and Extent of the Liability of the Company.*

It is in its character of bailee that the company meets its liability for negligence. In general, the extent of this is measured by the degree of deviation from the care required of the ordinary bailee or depositary for hire, which is the care that a “prudent and intelligent” man would exercise in regard to his own property under similar circumstances. There are two leading cases in which the liability of the company for negligence is considered, and understanding of the nature of the company’s responsibility cannot better be had than through an abstract of them.

The first is that of the Safe-Deposit Company of Pittsburgh *v.* Pollock (85 Penn. State, 391), where the company contracted with a depositor to “keep a constant and adequate guard and watch over and upon the safe” rented by him. A number of bonds deposited therein were found to be missing. The jury found that the depositor put them in the safe, and did not remove them therefrom. There was no evidence that the vault or the safe had been broken, or that the lock had been tampered with. These facts being unquestioned, and the bonds having been taken from the safe, it necessarily followed that it had been opened with a key suited to the lock. The fact that the bonds were taken under these circumstances was evidence that the company had not kept “a constant and adequate guard and watch over and upon the safe,” as by its agreement it was bound to do. It was held from these facts that the manner in which the bonds were undoubtedly taken threw upon

the company the necessity of making some explanation for the absence of the bonds, and that the question as to whether or not the company was guilty of negligence was properly left to the jury.

The other case is that of *Roberts v. The Stuyvesant Safe-Deposit Company* (123 N. Y. 57), previously referred to. There property was taken from the safe of a depositor in the vault of the company by officers acting under a search warrant. The description in the warrant of the property sought for did not sufficiently correspond with the property found in the safe to establish its identity as the property in question. Nevertheless, the officers removed it. It was held that the taking of the property under such circumstances was a trespass, which should have been prevented, if possible, by the officers of the company; or they should have used legal means to regain possession of it.

The court stated the rule establishing the duty of the company as follows: —

“When property in the custody of a bailee for hire is demanded by third persons, under color of process, it becomes his duty to ascertain whether the process is such as requires him to surrender the property, and if it is not, then it is his right and duty to refuse, and to offer such resistance to the taking, and adopt such measures for reclaiming it, if taken, as a prudent and intelligent man would, if it had been demanded and taken under a claim of right to the property by another without legal process. The defendant did not discharge the duty that it owed to the bailor and owner of the property by merely making a formal protest against entering the vaults where the property was.”

It is appropriate to advert here to the rule of evidence applied in the case of the *Safe-Deposit Company of Pittsburgh v. Pollock*, to the effect that, in cases against safe-deposit companies for damages on account of negligence, the burden of proof is on the plaintiff, unless there is *prima facie* evidence of negligence on the part of the defendant, calling for explanation from him. This follows the general rule, as stated in *Edwards on Bailments*, Art. 399, thus: “It rests with the party alleging a fact by way of maintaining or defending an action to establish it by evidence.”

What constitutes *prima facie* evidence is thus given in the same paragraph: “The bailor makes a *prima facie* case when he shows such loss or damage to the chattel as ordinarily does not happen when the care which the law requires in the particular kind of bail-



ment is exercised." The doctrine is followed in *Arnot v. Branco-nier*, 14 Mo. App. 431, and *Collins v. Bennett*, 46 N. Y. 490.

It is also to be noted from the case of *Safe-Deposit Company v. Pollock*, that the question as to whether or not there has been negligence is for the jury.

### III. *The Position and Duty of the Company in Case of Legal Proceedings against the Property of a Depositor.*

The system of safeguards with which safe-deposit vaults are provided is now very complete. The mode of construction is such as to offer a very slight opportunity for entry from without by thieves. Devices by which the lock upon each safe is made different from the others, and methods for securing the complete identification of customers, have reduced to a minimum the possibility of an impostor gaining access to one of the private safes through deceit practised upon the custodian. Hence there is little chance for the company to incur liability through theft or loss of property arising from negligence on its part. Where, however, the officers of the company are called upon to exercise the greatest care and discretion, in order to protect adequately the property in their charge, is in the case of an attempt to reach the property of a depositor through process of law. The position of the company in such a case, and especially the form of process that will reach property deposited with it, are among the most important questions in connection with the business which the courts have been called upon to decide. These points have been so clearly established that those acting for the company may be sure of two things: that the extent of their duty is reached in satisfying themselves beyond question that the process is legal and regular; and that, this being so, the company is exempt from all responsibility for the subsequent acts of the officer under it.

We may now proceed to consider the steps by which these conclusions were arrived at, in the course of which it will be seen that the company cannot be subjected to garnishment or trustee process; that the only process by which property deposited with it can be reached is through seizure by the sheriff under direct attachment; also, that the company is not liable for property of third persons taken from the safe of the debtor, either as his property or because confused with his property.

The rule that the company is not subject to garnishment or trus-

tee process arises from the fact that there is no possession in the company of the property deposited in its safes. That is the distinguishing feature of this kind of bailment. The company leases a safe to a depositor, and retains the controlling or master key to the lock. The holding of this key leaves with the company the control of the access to the safe, but in no wise gives it possession of the property therein placed. The master key is retained in order to perfect the security from theft or molestation that the company undertakes to provide. The company does not obtain or desire possession of the property. That remains absolutely in the depositor.

To enable garnishment to lie against a bailee, he must have more than constructive possession, as well as custody, of the property in his charge. Thus, to quote from *Waples on Attachment*, Art. 453:—

“It would seem, therefore, that . . . baggage, though given to the railroad company for transportation, is still in the owner’s possession. It is in much the same condition as when given to an expressman at the end of the journey to be taken to a hotel. . . . No one would think the expressman . . . subject to garnishment as the possessor of the passenger’s property. . . . As the keeper of a livery stable cannot be subjected to garnishment because horses of the defendant in an attachment suit are kept in his stable, so a like temporary possession of the trunk for transportation from depot to hotel, with like liability to have the owner take possession at will, ought not to subject the carrier to garnishment should a creditor of the passenger seek to attach them. The trunks may be attached,—the horses in the livery stable may be,—but not attached in the hands of third persons under the circumstances suggested. They may be seized by the sheriff as in the hands of the defendant, and taken directly into the sheriff’s custody.”<sup>1</sup>

So, from the opinion of the court in *Gregg v. Hilson* (8 Phila. 91):—

“I think it very clear that these rented safes cannot be the subject of attachment under the Act of June 16, 1836, sect. 35, Pamph. L. 767. They are not a debt due to the defendant, or a deposit of money made by him, or goods or chattels pawned, pledged, or demised. The contents of the safe are in the actual possession of the renter of the safe; they have not been deposited with or demised to the company. I am asked to make an

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<sup>1</sup> *Hall v. Filter Mfg. Co.*, 10 Phila. 370; *West. R. R. v. Thornton*, 60 Ga. 300.

order upon the company to open the safe and file an inventory of its contents. This I am of opinion I have no power to do."

In *Bottom v. Clarke* (7 Cush. 487), where a locked trunk was deposited in the vault of a bank for safe-keeping merely, with the consent of the officers of the bank, who were ignorant of its contents and had no authority to open the trunk for the purpose of ascertaining them, it was held that neither the bank nor its officers could be charged by the trustee process either for the contents of the trunk or the trunk itself.

Garnishment, therefore, cannot be resorted to for the purpose of reaching property so deposited, and seizure by the sheriff under direct attachment remains as the only available method. That this may be used can be gathered from the paragraph quoted from *Waples on Attachment* and the cases cited. Beyond this, that the legality of such seizure has been upheld by the courts is shown in *Roberts v. The Stuyvesant Safe-Deposit Company* (123 N. Y. 57) and *United States v. Graff* (67 Barb. 304), in both of which cases the process was held to be regular. In the latter case, the fact that it had been held in *Gregg v. Hilson* that garnishment would not lie against a safe-deposit company was used as an argument by the court in holding that property deposited with such a company could be seized by the sheriff, on the ground that property so placed must of necessity be subject to some form of process. The reasoning of the court in this connection is very clear: —

"There was nothing improper in that part of the order made which directed the sheriff to open the safe and tin box containing the defendant's property. The process could be effectually served in no other way. It was the duty of the officer acting under it immediately to attach the real and personal estate of the debtor. And that could only be done by taking it into his custody, where the property was tangible in its character. Neither the safe nor the tin box constituted any portion of the defendant's dwelling, and they were not within the protection which the law affords to that against an officer acting under civil process. They were simply places of deposit and safe-keeping for the defendant's property, which the sheriff may enter to make the seizure required by law in the execution of the process in his hands. If that were not so, there would be nothing to prevent a failing or insolvent debtor from turning all his property into valuable securities or other articles, requiring but little space for their custody, and then placing them in the hands of a safe-deposit company for preservation, and defying all the efforts of his creditors to satisfy their debts by resorting to them. That would form an



expedient for the success of fraudulent devices, which might render the laws of the State for the collection of debts entirely powerless. No such effect could be given to a deposit of that nature without at once defeating the object plainly designed to be secured by the law in rendering the debtor's property liable to the process issued in favor of his creditors in actions brought to recover their just debts. Against that, his dwelling alone is secured against the intrusive action of the officer. And that in no sense can be so extended as to include either the safe or tin box in the custody of the Mercantile Trust Company for the defendant. A case has been presented on the points relied upon by the company's counsel, supposed to be in conflict with this conclusion. It arose under the laws of Pennsylvania. And it was there held that the company could not be required to furnish a certificate of the contents of the safe, because they were virtually in the possession of the lessee. It is not necessary to consider the point whether this decision was properly made, for if it was then it is very clear that the only way in which the debtor's property held in that manner can be rendered liable to the owner's creditors is by seizure under attachment issued to the sheriff. If a certificate cannot be obtained showing the property so held for the debtor, and it cannot be seized under attachment or execution, then certainly the creditors are deprived of all means for applying it to the satisfaction of their debts. And an effectual mode would at last be discovered for enabling the debtor to withhold his property from his creditors. The law has not yet, and probably will not very soon, lend its aid to the success of such an expedient for the protection of a debtor's property against the clearly defined rights of his creditors."

The sheriff, then, must make the seizure of the property himself, and the question that at once arises is what assistance he may demand from the company.

The courts have made it very clear that the company can be compelled to take no action that would cause a breach of trust on its part. Thus, in *Bottom v. Clark*, it was held that the officers of the bank could neither open the trunk placed in their charge, for the purpose of ascertaining whether or not it contained attachable property, nor could they give the trunk over into possession of the sheriff, for the reason that they had no knowledge of its contents, and therefore could not act on a supposition in regard to them. In *Gregg v. Hilson*, on much the same grounds, the court would not permit the safe-deposit company to open a box for the purpose of disclosing its contents to officers, since the company had no possession of the property, and could consequently presume to exercise none over it.

Where, however, the assistance of the company's officers would not lead to a breach of trust, they may be compelled to give it. For the sheriff to be able to attach the property by taking it into his possession, he must of necessity know whether or not the debtor rents a safe of the company, and, if so, its location. If the officers of the company are satisfied that the writ is regular and the sheriff has a right to demand this information, they may safely give it to him. If they refuse, it may be obtained through an appeal to the court, as was done in the case of *Roberts v. The Stuyvesant Safe-Deposit Company*. The company having found that it is authorized in giving the sheriff assistance to this extent, it becomes important to know its position in relation to the subsequent acts of the officer. As far as these are concerned, the liability of the company ceases with its verification of the sheriff's authority, and he may then force the door of the safe and take possession of whatever attachable property it may contain of the debtor, — and even of third persons, where it does not admit of identification or separation, — without being guilty of trespass himself or in any way involving the company in liability.

The extent to which an officer may go, in order to make an attachment of property under a writ lawfully issued, has been clearly defined in cases that apply directly to this subject. In *Burton v. Wilkinson* (18 Vt. 186), it was held that the officer may force the door of a warehouse in order to attach property of a defendant, if he be refused admittance by those in charge of the warehouse having the keys. Also, that, if the defendant holds the goods so placed with the warehouseman by a title illegal, the latter may show the lawful seizure in excuse for not delivering them against the true owner as well as against his bailor. Following is an interesting extract from the opinion of the court covering the latter holding: —

“The wharfinger is the agent of the person of whom he receives the goods, and cannot dispute the title of his principal in an action brought by the principal against him. But this cannot protect the goods thus received from an execution against the person thus depositing them; and if they are taken from the wharfinger or warehouseman by lawful process, the wharfinger or warehouseman can protect himself in a suit brought against him by the owner. If the person from whom the wharfinger or warehouseman receives the goods claims the same by a title illegal, so that he cannot lawfully hold them, and they are taken by authority of the law out of the custody and care of the wharfinger, the latter may show this in excuse for not delivering them.”

In the case of confusion of goods the principle is equally distinct. This is clearly expressed by the court, in the case of *Wilson v. Lane* (33 N. H. 466), as follows:—

"The question arose in this country as early as 1810 in the case of *Bond v. Ward* (7 Mass. 123), and it was held by Parsons and the court, that if the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods that the officer, on due inquiry, cannot distinguish them, the owner can maintain no action against the officer until notice and demand of his goods and a refusal or delay of the officer to redeliver them. In *Shumway v. Rutter* (8 Pick. 443), it was again held that, when the owner of chattels suffers them to be mixed with those of another person so that they cannot be distinguished, an officer will not be liable to an action of trespass for attaching them as the property of such other person. . . . The doctrines of these cases were fully recognized here in the case of *Lewis v. Whittemore* (5 N. H. 364), where it was held that it was the duty of the officer to attach the goods of the debtor, notwithstanding they were mixed with the goods of the plaintiff; and he had a right to take and hold the whole until the plaintiff identified his goods and demanded a re-delivery. The sheriff cannot be treated as a trespasser for doing what he has a right to do."

Recognition of the general principle governing these cases is thus shown in the opinion in *Roberts v. The Stuyvesant Safe-Deposit Company*: "It is no doubt true that a bailee for reward, such as the defendant was, may excuse himself for a failure to deliver the property to the bailor when called for by showing that the property was taken out of his custody under the authority of valid legal process, and that within a reasonable time he gave notice of the fact to the owner," citing *Bliven v. H. R. R. Co.*, 36 N. Y. 403; *W. T. Co. v. Barber*, 56 N. Y. 544; *Van Winkle v. U. S. M. S. S. Co.*, 37 Barb. 122; *Livingston v. Miller*, 48 Hun, 232; *Stiles v. Davis*, 1 Black. 101.

But the same case shows that where there has been original neglect of duty on the part of the company, in allowing goods of a depositor to be removed on invalid process, the fact that the same goods were subsequently levied upon under valid process will not so cure such neglect that it may be offered in excuse by the company.

"The rule in such cases seems to be that when a bailee is sued by the owner for the conversion or negligent loss of the property bailed, it is not a defence or bar to the action to show that, after it went into the pos-



session of others, it was levied upon under process against the owner. . . . We do not think that the mere levy of an execution or attachment upon the property by a creditor of the owner, while it is in possession of the tortfeasor, is available as a defence or in mitigation. It must be shown that the owner had the benefit of it in such a way as to operate in law as a restoration of the property. None of the authorities that have been brought to our attention maintain the proposition that to show a levy alone is sufficient; and such a rule could not be supported in reason or justice."

It is, therefore, clear that both the company and the officer are protected in all proceedings conducted regularly under valid process. The further exemption of the company itself from any liability arising under the acts of the officer, after proof of his authority, is rendered complete by a significant ruling of the court in *United States v. Graff*. By this the officers and representatives of the company are not allowed to be present at the time of the opening of the safe by the sheriff; whereby the sole responsibility of the latter for his own acts is of necessity recognized. As a result of this, it follows that the company may avail itself equally with him of any defences which the law provides for his protection.

The plaintiff, in the case referred to, appealed from so much of an order made by the special term at Chambers as directed the exclusion of counsel and agents of each party at the time of opening the safe by the sheriff. The court in confirming the order ruled as follows: —

"The portion of the order from which the plaintiff has appealed was clearly right. Without it the obligation would rest upon the officer to prevent the process he was required to execute from being converted into an instrument of investigation of the debtor's private papers. Such a use of it would be an abuse requiring the punishment of the officer permitting it to be done under color of process delivered for an entirely different and lawful purpose. The order did no more than declare the duty of the officer, as the law defined it. It was a very proper exercise of the discretion of the court."

Whatever the results that the court thought it desirable to avoid thereby, it is clear that, with the exclusion of the representatives of the company, — particularly their exclusion in the character of unofficial witnesses merely, — all connection of the company with the property, in any capacity, was regarded as at an end from that time.

IV. *The Relation between Depositors having a Community of Interest in a Safe.*

Where two or more individuals rent a safe together, it is customary for them to sign an agreement on the books of the company reading somewhat as follows: "We agree to hire and hold safe No. — as joint tenants, the survivor or survivors to have access thereto in case of the death of either." In the case of *Hackett v. Patterson* (16 N. Y. Supp. 170), the court was called upon to define the nature of such a tenancy and the rights and interests of the parties in the safe. They were here regarded in the same way as co-tenants of real property, and, whether joint tenants or tenants in common, as coming within the rules governing the similar relation in the holding of real property. The plaintiffs' testator and the defendant leased a safe in the vaults of the New York Safe-Deposit Company, and, on the death of the testator, his interest in these was, with the defendant's consent, transferred to the plaintiffs on the books of the company for the period of one year. A few days before the expiration of such year, the defendant procured a renewal of the lease in his own name, to the exclusion of the plaintiffs. The receipt for rent paid by the plaintiffs stated that the safe would not be deemed to be relinquished until the keys should be returned. The plaintiffs retained the keys until some months after the expiration of the lease. It was held that the renewal, privately acquired by the defendant in his own name, inured to the benefit of the plaintiffs, his co-tenants. In rendering the opinion of the court, Bischoff, J., said: —

"The new lease constituted the plaintiffs and defendant Patterson joint lessees, and whether their relation thereunder was that of joint-tenants or tenants in common is equally immaterial in disposing of the question presented for adjudication, since either relation involves the application of the same principles of equity jurisprudence. 'Equality is equity,' and, steadily adhering to the application of this familiar maxim, courts of equity have ever regarded the rights of joint tenants and tenants in common respecting their common estate to be reciprocal, neither being permitted during the continuance of the co-tenancy furtively to acquire and hold any advantage which would not also inure to the other's benefit, provided the latter manifests a willingness to assume his just proportion of any burdens attending its acquisition and maintenance. . . . The only adequate relief was to accord plaintiffs that access to the safe to which, as beneficiaries of the leasehold interest, they were entitled,

and the exclusive jurisdiction of equity in matters of trust authorized that court to take cognizance of the action."

The mutual interests and responsibilities existing in the tenants through their community of interest in the safe is not, however, extended to the property there deposited, to the end that one tenant is supposed to have knowledge of or control over the property deposited by his co-tenant; so that, where two persons held a safe-deposit box in common, and one of them, without authority, abstracted therefrom, and transferred to an innocent purchaser for value, a certificate of stock belonging to the other, it was held that the certificate was not intrusted to the possession of the wrongdoer, either directly, indirectly, or impliedly; nor was he authorized to remove it from the box; and that, therefore, there could be no application of the rule that, where one of two innocent persons must suffer through the fraud of a third person, he must bear the loss who placed it in the power of the third person to commit the fraud.<sup>1</sup>

*Thomas K. Cummins, Jr.*

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<sup>1</sup> Bangor Elec. Light Co. v. Robinson, 52 Fed. Rep. 520.



# HARVARD LAW REVIEW.

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THE LANGDELL Number of the REVIEW is an expression of the debt owed to Professor Langdell by his colleagues; the meeting of the Harvard Law School Association this June will be an expression of the debt owed to him by the graduates of the School, and, from the presence of the distinguished orator of that occasion, of the debt owed by all law and lawyers. It may not be amiss to complete the record by saying something of the special debt owed to him by the students in the School. It is not easy for a man who has studied here even for a little while to be ignorant that the unexampled means of study which lie ready at his hand are not matters of course. It is worth each man's while to remember now in the time of his present enjoyment that all these things are owed directly or indirectly to the Dean and to his twenty-five years of hard work; his has been the moving hand, his the responsibility, and to him credit is due. This is an occasion when the present students may recognize their obligation for all these causes which have made it such a very pleasant and profitable labor to be a student in the School. The Editors of the REVIEW speak confidently for all in expressing the gratitude which the students in the School feel for all the great things which they enjoy because Dean Langdell has done his work so well.

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By a clerical error it was stated in the May number of the REVIEW that the celebration of the Harvard Law School Association would occur on June 28. This should have been June 25, the day before Commencement, which comes this year on June 26.

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THE PRESUMPTION OF INNOCENCE. — In a criminal case, recently before the United States Supreme Court, a refusal to charge that innocence is presumed till guilt is proved beyond a reasonable doubt was held erroneous, notwithstanding that the court charged fully and accurately that the burden was on the prosecution to prove guilt beyond a reasonable doubt. *Coffin*

v. *United States*, 15 Sup. Ct. Rep. 394. Mr. Justice White, who delivered the opinion of the court, lays down the principle that a presumption is, of itself, evidence, while the doctrine of reasonable doubt applies only to the effect of the evidence, and therefore to say that the one is the equivalent of the other is to say that the exclusion of an important piece of evidence can be justified by charging correctly as to that part which is not excluded.

The definition of a presumption as evidence is, perhaps, not perfectly consistent with the definition of evidence as a "matter of fact to be used as a basis of inference to another matter of fact" (3 HARVARD LAW REVIEW, 142). And the presumption of innocence, however it be defined, does not seem as clear and satisfactory in its nature and effect as do presumptions in general. It is easy to understand the nature and effect of all presumptions in favor of facts which would otherwise have to be proved. Such presumptions are an alleviation of proof, the *levamen probationis* of the Roman law, and their effect is to throw upon the opposite party the duty of going forward with evidence. Thus if it is necessary for a prosecutor to prove the sanity of a prisoner, or for a plaintiff to prove the immemorial antiquity of a custom, the presumption comes to his assistance, he is relieved of the duty of proving a part of his case, he has thrown upon his adversary the duty of going forward with evidence. But the presumption of innocence seems to be wholly different in its nature and effect. It is not an alleviation of proof, because the prisoner has no duty to prove innocence, nor does it throw upon the opposite party the duty of going forward with evidence, for that duty is already upon the opposite party by the merciful requirement of the criminal law that the prosecution shall prove guilt, and prove it beyond a reasonable doubt. What, then, is the significance of the presumption of innocence? Text-writers of distinction and one or two courts (Chamberlayne's Best on Ev. 1893, p. 309; 1 Stephen, Hist. Crim. Law, p. 438; *Moorehead v. State*, 34 Oh. St. 212; *People v. Potter*, 89 Mich. 353; *People v. Graney*, 91 Mich. 646) have believed that the expression means nothing more than that the burden of proof is on the prosecution to establish the prisoner's guilt beyond a reasonable doubt. The anomalous nature of the so-called presumption, its uncertain effect on the case, the ample protection afforded the prisoner by the burden of proof on the prosecution, and the fact that the presumption is said to be rebutted only by proof beyond a reasonable doubt, are among the considerations which have led to this belief. Mr. Justice White is of opinion that those who entertain it have failed to discriminate properly.

The actual decision is merely that a point-blank refusal to charge that there is a presumption of innocence, is error. In so far as this means that the refusal, if unexplained, might mislead the jury and prejudice them against the prisoner, it would perhaps be assented to even by the courts and text-writers, who deny the distinction between the presumption of innocence and the duty of establishing. The prisoner is clearly entitled to have the jury understand that there is no presumption of guilt. But it does not seem necessarily to follow that there is a presumption of innocence. It may well be that there is no presumption at all, and if there is one, its effect on the case would seem to be too indefinite and misty to make it of much practical assistance to a jury.



NEW COMMERCIAL COURTS IN ENGLAND. — The expense and delay of mercantile litigation is a common and not unjustified source of complaint among business men, who feel that deterring suitors from enforcing their rights through a fear that justice will cost more than it is worth is hardly a legitimate application of the maxim that it is the policy of the law to discourage litigation. Some properly authorized method of judicial arbitration has been the remedy most frequently suggested. Some time ago England provided for the settlement of large classes of actions by private arbitration under certain regular rules; but after a full trial the system has given much less relief than was expected. The judicial inexperience of lay arbitrators, their lack of coercive power, their tendency to compromise, and the difficulty of avoiding appealable irregularities in their proceedings have shown that arbitration is successful only within narrow limits.

In consequence of this failure, what is called a Commercial Court has just been established, solely to determine mercantile disputes. It is intended to combine the authority and experience of an able judge with an elastic procedure adapted to the prompt settlement of actions. It certainly seems more sensible to shape the public tribunals of justice to existing needs than to shift the burden to the shoulders of private arbitration, and the importance of this latest experiment is by no means confined to the country making it.

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COMPARATIVE LEGISLATION. — That neat and useful little summary of State legislation in 1894 in the New York State Library Bulletin, is now at hand, and gives, as usual, a concise and comprehensive view of its subject. A glance at the array of material suggests how much food for reflection lies in this topic, and how inadequately treated it usually is. It is, perhaps, not surprising that the ordinary lawyer, rushed with business, should content himself with noticing only the statutory changes in the law of the jurisdiction in which he practises, but it certainly is somewhat to be regretted. Such summaries as these, and such addresses as Judge Cooley's at the meeting of the American Bar Association in 1894, call attention only too unmistakably to the importance and the past neglect of the study of comparative contemporaneous legislation.

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BANKER'S LIEN. — A recent decision in Kentucky is of interest as a new authority on an old and much disputed question in the law of banker's lien. The facts of the case were these. A bank discounted and held a note, and at the maturity thereof held on general deposit for the maker a sum sufficient to pay the note. It permitted this sum to be checked out, and the question was whether the defendant, a surety on the note, was thereby discharged. Defendant had signed the note, which presumably was a joint and several one, as a co-maker, but the bank knew that he was only a surety. The Court of Appeals of Kentucky held that the surety was discharged. *Pursifull v. Pineville Banking Co.'s Assignee*, 30 S. W. R. 203. The authorities are irreconcilable, but it is believed that on principle the decision is perfectly sound. In accord with it are *McDowell v. Bank of Wilmington*, 1 Harrington (Del.), 369; *Bank v. Henninger*, 105 Pa. St. 496. And see Morse, Banks and Banking, 3d ed. § 503. The opposite view is taken in *Bank v. Hill*,



76 Ind. 223; *Voss v. Bank*, 83 Ill. 599; *Martin v. Bank*, 6 Har. & J. 235; *Bank v. Peck*, 127 Mass. 298 (*obiter*).

It is of course well settled that in cases of this sort the bank may, if it chooses, refuse to pay so much of its debt to the depositor as will equal the debt which the depositor in turn owes the bank. If this right of refusing to pay, which is sometimes called a set-off and sometimes a lien, is a genuine lien, it would seem to follow that the bank, by voluntarily paying the depositor's claim, relinquished a lien, and so discharged a surety on the depositor's note, in like manner as the relinquishment of any other security would discharge a surety. May not this right of refusing to pay the depositor's claim very properly be regarded as a lien—a lien on the claim? It gives the bank the right of retaining control over the claim for the purpose of security, and such a right, when given by law over the property of another, is certainly very similar to a lien. To be sure it is a lien on a *chose in action*, but that does not seem to be an insuperable difficulty. A stock certificate is a *chose in action*, and clearly the bank would have a lien on a stock certificate deposited with it, even if the certificate happened to be one of its own, and so, as in the principal case, a claim against the bank itself. The only difference, so far as is perceived, between the case of the stock-certificate and the principal case, is that in the latter there is no formal assignment to the bank of the depositor's claim, the *chose in action*. But as the law has already given the bank power to deal with the claim for its security in like manner as if it had been assigned, a formal act of assignment does not seem to be called for.

If it be conceded that the banker's right of control over the depositor's claim is a lien on the claim, there would seem to be no difficulty on principle with the Kentucky decision; for payment of the claim would clearly be a relinquishment of the lien, and so a discharge of the surety. That the result which the case reaches is a desirable one from the standpoint of justice and convenience seems hardly open to question. If the bank wishes to be polite, and honor its depositor's checks regardless of the state of accounts between them, it ought not to call on the surety to make good the resulting loss.

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STATUTE OF LIMITATIONS. — An interesting point, apparently a novel one in this country, has arisen in the Pennsylvania courts (*Lewey v. Frick Coke Co.*, 31 Atl. Rep. 261). The defendant company mined coal under the plaintiff's land, inadvertently it would seem, though the report is not clear. For seven years the plaintiff had no means of discovering the defendant's act. The defendant, in an action of trespass, set up the Statute of Limitations. The court, in its alternative capacity of court of equity, treated the action as though the plaintiff had brought a bill of account for coal taken; and declined to apply the Statute of Limitations on the ground that before a plaintiff has had reasonable means of discovering the existence of his cause of action, equity will not allow the Statute of Limitations to operate as a bar to his suit. The court satisfactorily distinguishes an underground trespass, with its exceptional characteristics, and its difficulty, often impossibility, of speedy discovery, from a surface trespass, where the owner of the close is held to know, constructively at least, of any invasion of his boundaries. Some hesitation may be felt in admitting the propriety of allowing a bill of account for coal taken with-

out more; or in accepting the broad rule here laid down as governing the courts of equity in applying the Statute of Limitations. Yet English authority is in accord with the case on both points (*Ecclesiastical Commissioners v. N. E. R. Co.*, 4 Ch. Div. 845; Bainbridge, *Law of Mines*, 311). Certainly the doctrine that equity will not apply the Statute of Limitations before the plaintiff has been guilty of laches appears sound on principle (*Brooksbank v. Smith*, 2 Y. & C. 58) and thoroughly sensible. The case is likely to be followed when the question arises in other jurisdictions. To be sure, the court in the principal case attempts to lay down, as another reason for not applying the statute, that failure to disclose an inadvertent trespass is fraud; but that position seems indefensible either on principle or authority (*Dawes v. Bagnall*, 23 W. R. 690).

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BREACH OF CONTRACT TO DELIVER IN INSTALMENTS.—A recent New Jersey case (*Gerli v. Poidebard Silk Mfg. Co.*, 31 Atl. 401) denies the doctrine of *Norrington v. Wright*, 115 U. S. 188, that, when there is a contract to deliver goods in instalments, a failure as to the first instalment gives the buyer a right to terminate the contract. In the New Jersey case the agreement called for the delivery of thirty bales of silk in three equal monthly instalments, and the defendant was held unjustified in cancelling the contract upon a failure to deliver the first instalment. The ground for this decision seems to have been that the plaintiff's breach did not evince an intention to abandon the contract, or not to be bound by its terms, following the English rule laid down in *Mersey Steel Co. v. Naylor*, 9 App. Cas. 434.

Neither the rule in *Norrington v. Wright*, which perhaps would not be followed literally by the United States Supreme Court, nor the one recognized by the New Jersey Court, seems satisfactory in all cases. A breach in regard to the first instalment ought not to be fatal to the entire contract, unless of such extent or nature as substantially to imperil the objects of the contract, or to create a reasonable apprehension of such a consequence. Other things being equal, doubtless an abandonment of the contract is often justified by a breach *in limine* of less magnitude than would be required if it occurred after part performance by the party in default; but this is not merely because the breach occurs at the outset, but because a breach at that time may be more significant of ultimate failure than one that happens later, and especially because no equities have been created between the parties by benefits received under the contract.

On the other hand, any breach that does substantially interfere with the objects of the contract ought to be good ground for a rescission or abandonment, no matter how excellent the intentions of the party in default. That the aggrieved party may obtain compensation for future breaches as well as past ones, should his confidence prove misplaced, does not help the New Jersey argument very much. The same might be said of any contract whose conditions have been partly but substantially violated, and the abandonment of a broken contract would seldom be legally possible to the innocent party. Whatever may be the ethical importance of good intentions they manifestly have little commercial value to the man who sees a lawsuit between himself and the realization of the profits of his contract.

It is hardly good common sense, and it is difficult to believe it is good



law, to compel a purchaser either to rely upon the uncertain future performance of a seller already in default, or to buy his goods elsewhere at the risk of responding in damages should the original vendor prove prepared to fulfil the remainder of his contract. On the facts of this particular case the dissenting opinion of Van Syckel, J., seems the better view.

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ANOTHER TURNTABLE DECISION. — An interesting and only too frequent problem presented to courts for solution is whether a little fellow attracted by an unfastened turntable can recover against a railroad company for negligence, — a question usually depending entirely upon the existence of a duty in the case. In *Walsh v. Fitchburg R. Co.*, 39 N. E. R. 1068, reversing *Walsh v. Fitchburg R. Co.*, 28 N. Y. Supp. 1097, the New York Court of Appeals has expressed a strong opinion, almost decided, — almost, for the case is, perhaps, explainable on other grounds, — that he cannot. This result is, doubtless, in accord with some of the most carefully considered judgments on this point, but is, on the whole, rather against the numerical weight of authority. The latter cases, while not claiming that landowners must furnish safe premises for trespassers, contend that contrivances introduced, liable to allure children, must not be carelessly allowed to become death-traps for the young and unwary. This doctrine, although attempting to distinguish between juvenile and adult trespassers, and easily capable of being made ridiculous by too great an extension, seems fair and just enough if properly limited, as in this connection. There is no endeavor to impose an insurer's liability, only reasonable care of a most dangerous thing is demanded; nor is it hoped that vicious children can be kept away, only those who are unaware of the peril are to be protected. In some jurisdictions, the feeling that parents should be compelled to look out for their infants, and the undoubted practical truth that any recovery by the child would probably inure to the benefit of the careless guardians, have had great weight. In New York, however, where the doctrine of imputed negligence still flourishes, that reason would seem of little force. From the theoretical point of view much can be said on either side, but one cannot but sympathize with the more merciful and less technical rule, the one at which, perhaps unfortunately, the New York court did not arrive.

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VICE-PRINCIPAL DOCTRINE. — The doctrine of vice-principal is one whose value, theoretical and practical, may well be doubted; nor do the tests which are used in its application render it more attractive. In *Blomquist v. C., M. & St. P. Ry. Co.* (Supreme Court of Minnesota, Apr. 9, 1895), the difficulty of a satisfactory determination as to when the superior servant is a vice-principal, has lead to a vigorous dissent by Canty, J., in which some novel and interesting principles are laid down. The theory of the learned judge seems to be that the mere authority to hire, discharge, or oversee, is not the correct test, but that the disparity must be more substantial, such as disparity of knowledge or disparity of skill. Although it is, perhaps, impossible in the present state of the law on this subject (8 HARVARD LAW REVIEW, 57) to judge accurately of the weight which is to be attached to such thoughtful discriminations, yet the careful opinion of Canty, J., is one which cannot profitably be disregarded by any person interested in the development of this doctrine.



CONSTRUCTIVE TRUSTS. — In a recent New York case (*Hutchinson v. Hutchinson*, 32 N. Y. Sup. 390), the plaintiff conveyed lands to the defendant, his sister, without consideration, and in reliance on her parol promise to hold in trust for him. Plaintiff brought action for reconveyance, and it was held that the case fell within the Statute of Frauds, and that plaintiff was not entitled to reconveyance. There was no actual fraud other than breach of promise, and the court held that a confidential relation did not exist between plaintiff and defendant. The case is in line with the New York decisions, which have held consistently since *Sturtevant v. Sturtevant*, 20 N. Y. 39, that a grantor who conveys on grantee's parol promise to hold in trust for him, can get no redress in case of breach of promise; unless there exist a confidential relation between the parties to the action (*Goldsmith v. Goldsmith*, 39 N. E. R. 1067). Fraud would take the case out of the Statute, but the New York Courts require something more than a mere breach of parol promise to reconvey to constitute fraud in a legal sense. (*Wood v. Rabe*, 96 N. Y. 414 at 226.) The English doctrine, on the other hand, recently reaffirmed in *Davis v. Whitehead* (1894), 2 Ch. Div. 133 (overruling *Leman v. Whitley*, 4 Russ. 423), allows the grantor to compel reconveyance, not by way of enforcing the parol agreement of trust, but because it would be fraud on the grantor to allow the grantee to keep what he has obtained without giving the promised consideration, or on the ground perhaps that the grantor is entitled — regardless of any element of fraud — to specific restitution for failure of consideration without more. Possibly the escape from the results of the New York doctrine may be found in a more liberal construction of the term "confidential relations," although there is no present authority for extending its meaning beyond very narrow limits. In any event, it is to be regretted that the New York courts have failed to notice, or at least to discuss failure of consideration as a ground for specific restitution. Specific restitution on this ground is not specific performance; it is built up on a very different theory. That the result arrived at in each case is the same — a decree for conveyance of land deeded on grantee's parol promise to reconvey — is merely fortuitous. The New York courts, however, are strongly committed, by a long line of precedents, to the doctrine of the principal case; and outside of New York, except in a few jurisdictions, notably Indiana (*Giffen v. Taylor*, 37 N. E. R. 393), the whole weight of American authority is adverse to the English view. One must be sanguine, then, to hope that the doctrine of specific restitution in cases of this sort will soon find wide acceptance in American courts.

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REPORT OF AMERICAN BAR ASSOCIATION FOR 1894. — Probably no other event of the year calls together so brilliant an assemblage of legal talent as the annual meeting of the American Bar Association. The published reports of these gatherings always contain suggestive matter for the lawyer concerned to strengthen the *morale* and raise the standard of the profession, as well as for one interested in a discussion of current legal questions; and this latest volume is particularly rich in material of both kinds.

Prominent in the former class are papers by John F. Dillon on "The True Professional Ideal," and by Wm. A. Keener on "The Inductive Method in Legal Education." Professor Keener's contribution stirred up the old discussion of the comparative merits of the lecture, text-book,

and case systems of teaching law. The consensus of opinion seemed to be that the case method was gaining ground, and that books of cases with some independent matter, like those edited by Prof. J. B. Thayer of Harvard were, perhaps, best adapted to the use of reasonably mature and able students.

An interesting letter was read, describing a Legal Dispensary conducted by the Law School of the University of Pennsylvania, designed to afford students some practical experience in dealing with actual cases. It may be noted in passing that since that time a similar experiment has been attempted by Harvard law students with somewhat profitable results.

The paper read by Charles C. Allen, of Missouri, on "Injunction and Organized Labor," an examination of the jurisdiction of courts of equity in cases of civil disturbance like the Chicago railway riots of last year, evoked the most elaborate discussion of the meeting. Perhaps an idea of the attitude of the profession generally upon this subject may be gained by noting that over three-fourths of those who took part in the argument disagreed with Mr. Allen, who thought an injunction a misconceived and unadvisable remedy under such circumstances. Both from a legal and a political point of view, the full text of the discussion contained in the report is well worth reading.

The other published proceedings of the Association, while interesting, need no special mention except the rather startling result of an investigation conducted by Mr. Frank C. Smith, of New York, which showed that one-half of all the points of law decided in the American courts of last resort in 1893 were points of procedure not involving the merits of the case at issue. Discouraging to relate, the code States make a worse showing than those that have retained the common-law practice. The task of reforming legal procedure seems truly Sisyphean.

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## RECENT CASES.

**AGENCY — EMPLOYMENT OF AN ATTORNEY BY COLLECTING AGENCY — COMPENSATION.** — Defendant placed a draft in the hands of a collecting agency for collection, and the agency employed plaintiff, an attorney in the city where the debtor lived, to collect and remit. Plaintiff seeks to recover for his services from defendant. *Held*, collecting agency acted as principal in the transaction and not as mere agent, and so plaintiff has no claim against defendant. *Dale v. Hepburn*, 32 N. Y. Supp. 269.

This case follows the settled law in New York and the U. S. Supreme Court. *Hoover v. Greenbaum*, 61 N. Y. 305; *Hoover v. Wise*, 91 U. S. 308. In some jurisdictions the courts hold that where paper is to be collected at a distance, there is an implied authority for collecting agency to employ a sub-agent to make the collection on account of the creditor. The question is one of fact, — was the agreement that the agency should collect the debt, or that it should merely employ some one else to collect it for the creditor? In the absence of any controlling evidence, it is submitted that the New York rule is the better; for, as the Court says, "if banks into whose care negotiable instruments are placed for collecting are regarded as principals, so much the more should a collection agency whose sole business is to collect claims placed in its hands, be so regarded."

**BAIL AFTER CONVICTION PENDING APPEAL — POWER OF JUSTICE OF SUPREME COURT.** — Paragraph 2, rule 36, of the Supreme Court of the United States (11 Sup. Ct. iv.), provides that where a writ of error is allowed in case of conviction of a crime, the justice or judge of the Circuit Court or District Court shall have power to



admit the accused to bail. *Held*, (1) the Supreme Court had no power to make the above rule, because the common law gives no right to admit to bail after conviction and sentence; no United States statute gives the right; nor does the power to make necessary rules for the orderly conduct of the business of the court give the right. (2) Under this rule Mr. Justice White of the Supreme Court, not being a justice of the circuit where the case was tried, could not make a valid order admitting defendant to bail pending the case on writ of error. *United States v. Hudson*, 65 Fed. Rep. 68.

Although bail will not ordinarily be allowed after conviction, yet it seems to be well settled that, in the absence of statute denying bail to a prisoner after conviction and sentence and pending appeal, the admission to bail is purely discretionary with the court, and may be allowed. 1 Bishop's Criminal Procedure, § 253, and cases cited. The decision on the second point would seem to be a sound interpretation of the Supreme Court rule. But both points were reversed in the following case.

**BAIL AFTER CONVICTION PENDING APPEAL — POWER OF JUSTICE OF SUPREME COURT.** — The defendant in preceding case petitioned for a writ of mandamus to the district judge to compel him to admit petitioner to bail. *Held*, (1) bail may be taken after conviction pending appeal, by order of the proper court, judge, or justice. (2) The order of Mr. Justice White admitting defendant to bail subject to the approval of the District Judge, was valid, since "any justice of this court, having power . . . to allow the writ of error . . . has the authority . . . to order the plaintiff in error to be admitted to bail." Mandamus granted to compel district judge to act and to exercise his discretion with regard to admitting petitioner to bail, not to control his discretion. *Hudson v. Parker*, 15 Sup. Ct. Rep. 450 (Brewer and Brown, JJ., dissenting).

The decision on the first point is unexceptionable. See references cited under preceding case. The second point is more doubtful. As a general rule, any court having appellate jurisdiction may take bail. But as Mr. Justice Brewer says, in his dissenting opinion, the Supreme Court, by naming in the rule certain judicial officers as the ones to admit to bail, has, on the principle *expressio unius exclusio alterius*, declared that it has named *all* who are to exercise that authority.

**BANKRUPTCY — PETITIONING CREDITOR — POWER TO GO BEHIND A JUDGMENT OBTAINED BY COMPROMISE.** — A bankruptcy petition was presented to a registrar founded on a judgment obtained by compromise. The registrar found the compromise unfair though not fraudulent, and refused the petition. On appeal to the Court of Appeal, it was *held*, by Lord Esher and Lopes, L. J., that the court could go behind the judgment and determine whether it was fair; that this was necessary to protect the debtor as well as the other creditors, who would be deprived of their right to get hold of the property if the debtor were put into bankruptcy; that as the fairness of the compromise could be looked into after the debtor was put into bankruptcy, it should be used to protect the other creditors. Rigby, L. J., dissented on the ground that, historically considered, bankruptcy courts had the power to reject a judgment debt only in cases where there was no consideration (which a later Bankruptcy Act had changed) and on ground of fraud. *In re Hawkins, Ex parte Troup* [1895], 1 Q. B. 404.

The dissenting Lord Justice is undoubtedly correct in his treatment of the cases historically; but the principle enunciated in those cases carries us as far as the majority of the court have gone in this case. See remarks of James, L. J., *Ex parte Kibble*, 10 Ch. App. p. 373, at p. 376; also of Lord Esher in *Ex parte Lennox*, 16 Q. B. D. 315, at 321, 322. The principle seems to be that, "having regard to the serious consequences to the debtor [and to other creditors] of allowing a bankruptcy notice to proceed, . . . if the debtor at the hearing . . . can satisfy the court that the judgment was obtained . . . under circumstances that make it inequitable that it should be enforced against him, the court would have power to set the notice aside." Robson's Law of Bankruptcy, 7th ed. p. 190. See also Williams' Law of Bankruptcy, 6th ed. § 37, pp. 113-114. The result of the majority seems an admirable one to reach, and comes within the principle of the previous cases.

**BILLS AND NOTES — BANKER'S LIEN — DISCHARGE OF SURETY.** — A bank discounted and held a note, and at the maturity thereof, held on general deposit for the maker a sum sufficient to pay the note. It permitted this sum to be checked out. *Held*, that a surety on the note was thereby discharged. *Pursifull v. Pineville Banking Co.'s Assignee*, 30 S. W. Rep. 203 (Ky.). See NOTES.

**CARRIERS — WARRANTY OF SEAWORTHINESS.** — *Held*, that a carrier is liable for losses incurred on a shipment of cattle through shrinkage or fall in market value,



resulting from delay occasioned by a breach of the warranty of seaworthiness, although such breach was due to a hidden defect in the propeller shaft of the vessel, not attributable to the carrier's negligence. *The Caledonia*, 15 Sup. Ct. Rep. 537.

This decision falls in line with the weight of authority and better opinion both in England and the United States, holding a shipowner responsible as an insurer as to latent defects in his vessel, unknown to him and not discoverable upon examination. 3 Kent's Comm. 205. The strong dissenting opinion of three members of the court is based upon an alleged distinction between an injury caused directly by breach of the warranty of seaworthiness and loss resulting from delay caused by such breach. There is no doubt that, generally speaking, a carrier is not an insurer as to the time of delivery or losses flowing out of accidental delay. But this is an action for consequential damages due to a breach of warranty. The fault of the carrier is the breaking the warranty; and it cannot be said that the delay caused thereby is excusable within the rule relied upon by the dissenting justices.

**CARRIERS — WHEN A CARRIER BECOMES WAREHOUSEMAN.** — A railway company, having carried plaintiff's goods to their destination, stored them in its warehouse, in which they were destroyed by fire, through no fault of the defendant. *Held*, that a railroad's liability as a common carrier continues until notice of the arrival of the goods is given to the consignee, and he has had a reasonable time thereafter to remove them. *Lake Erie & W. R. Co. v. Hatch*, 39 N. E. Rep. 1042 (Ohio).

The case is one of first impression, committing Ohio to the view advanced by the New York Courts in opposition to the great weight of authority, making the liability of the carrier as such terminate with the arrival of the goods at their destination. Formerly, an actual delivery of the goods was required of the carrier; and now that modern modes of transportation have made personal delivery impracticable, the jurisdictions which have settled upon a reasonable time for removal, or a reasonable time with notice, in substitution, claim that they are thus following the old common-law rule. In reality they have extended it beyond its utmost limits by making the carrier liable as a carrier when he has ceased to be one, and when the reasons for his extraordinary liability have ceased to exist.

**CHOSES IN ACTION — ASSIGNMENT — PRIORITY OF NOTICE TO DEBTOR.** — *Held*, where two assignments of a chose in action are made to different persons, the assignee who first gives notice of his claim to the debtor has the prior right, though the assignment to him is later in date than that to the other assignee. *Methuen et al. v. Staten Island Light, Heat & Power Co.*, 66 Fed. Rep. 113.

This case follows the settled rule in the U. S. Supreme Court, — *Spain v. Hamilton's Adm'r*, 1 Wall. 604, — in England and in some of our States. The contrary rule, that the prior assignee prevails, is established in New York, Massachusetts, and many of our States. It is submitted that the New York and Massachusetts rule is correct on principle, and that the general principle that "he who is first in time is best in right" should determine this class of cases, except (1) where the second assignee has been misled by prior assignee's failure to notify the debtor, and (2) where the second assignee has obtained payment, or, what is practically the same thing, reduced the claim to a judgment or effected a novation, in which cases the second assignee has obtained a legal right, and should not be compelled to give it up.

The case of *Spain v. Hamilton's Adm'r*, 1 Wall. 604, which established the rule in the U. S. Supreme Court, seems to have been decided on a misapprehension of an earlier decision by the same court, — that of *Judson v. Corcoran*, 17 How. 612. There the second assignee had reduced the claim to possession, and the decision is expressly put on that ground. And yet *Spain v. Hamilton's Adm'r* is decided as being clearly within the principles recognized in *Judson v. Corcoran*.

**CONSTITUTIONAL LAW — MUNICIPAL BOUNDARIES — LEGISLATIVE AND JUDICIAL POWER.** — An act of the legislature authorized the annexation of a strip of land lying in an adjoining county, to a city. The strip was entirely separated from the city by four distinct municipal corporations, running from the county line to the original boundary of the city. Plaintiff, a landowner in the strip, brought a bill to enjoin the collection of municipal taxes. *Held*, that the legislature had no power to extend the limits of a specially chartered city by adding to it lands entirely separated by intervening territory. Injunction granted. *City of Denver v. Conlehan*, 39 Pac. Rep. 425 (Col.).

The court go into the definitions of "city" and "town," and emphasize the idea of unity, of collectiveness, which they think is conveyed by the use of such terms. They conclude by saying that it was never contemplated by the law that the territorial limits of a city might include distinct parcels of land, separated from the city proper by intervening territory. *Smith v. Sherry*, 50 Wis. 210, seems to support the view taken by the court. But actual instances inconsistent with the above may be noted. Portions of sev-

eral English counties lie, like islands, entirely within the boundaries of neighboring counties. In Massachusetts, Cohasset is separated from the rest of Norfolk County by two intervening towns. For some time after the passage of the act authorizing the annexation of certain suburbs to Boston, Brighton was a part of the city, though at no point contiguous thereto. Doubtless similar separations exist. It is submitted that the principal case is an instance of the assumption, on the part of a court, of a power to regulate a matter which might be more properly left, it would seem, to the discretion of the legislature. See *Cooley*, Const. Lim. (6th ed.) 587, 616, and cases cited; 1 Dill. Mun. Corp. (4th ed.) § 185 and cases cited.

**CONSTITUTIONAL LAW — POLICE POWER — EXAMINING BOARD.** — A statute provided for an examining board of plumbers consisting of three experienced plumbers, the chief inspector of plumbing and drainage of the board of health, and the chief engineer having charge of sewers. It further required all persons engaged in the business of employing or master plumbers to undergo an examination by said board as to their fitness for conducting such a business. *Held* (Peckham, O'Brien and Bartlett, JJ., dissenting), the act is not void, but a valid exercise of the police power. *People v. Warden of City Prison*, 39 N. E. Rep. 686 (N. Y.).

The case shows a tendency in the New York court to retract from the position taken in *People v. Marx*, 99 N. Y. 377, and to recognize the bounds beyond which the judiciary cannot interfere with the doings of the legislature. The court takes the ground that where an act is intended and appropriate to accomplish the good of protecting the public health, the exercise of legislative discretion is not the subject of judicial review; and that an act should, if possible, be taken as having been passed with this intent. In accordance with this view, the Supreme Court of the United States, in considering the validity of a statute prohibiting the sale of oleomargarine, has said, "If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government." *Powell v. Pennsylvania*, 127 U. S. 678. The judiciary of Kansas has in a late case failed to recognize this limitation, and has declared void an ordinance restricting the business of city scavengers to persons appointed by the city. *In re Lowe*, 39 Pac. Rep. 710.

**CONSTITUTIONAL LAW — RAILWAY COMPANY — REGULATION OF FARES — REASONABLENESS.** — Plaintiff below sued a railway company under a statute which fixed the maximum rate of fare at three cents per mile, and which gave a penalty to the passenger for each overcharge. The company made offers tending to prove that the statutory rate was unreasonable, as under it the company was unable to pay the interest on the capital invested. The offers were ruled out, and the plaintiff had judgment, which was affirmed by the Supreme Court of Arkansas, and, on error, by the Supreme Court of the United States. *St. L. & S. F. Ry. Co. v. Gill*, 15 Sup. Ct. Rep. 484. The act incorporating the company which built the road originally authorized a charge of five cents per mile; and defendant, having succeeded to the franchise by a mesne conveyance, claimed the same privilege. The court held that the right to fix the fare did not accompany the property in its transfer to a purchaser, in the absence of express provision to that effect in the statute, citing *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gaines*, 103 U. S. 417; and *Railway v. Miller* 114 U. S. 176, as authority.

The court intimated that legislation establishing a rate of fare which was so unreasonable as to practically destroy the value of the carriers' property, might be held unconstitutional, as depriving the company of its property, without due process of law, considering and approving *Railroad Commission Cases*, 116 U. S. 307; *Dow v. Beidelman*, 125 U. S. 681; *Railway v. Minnesota*, 134 U. S. 418; *Railway v. Wellman*, 143 U. S. 339, and *Reagan v. Trust Co.*, 154 U. S. 362. But to declare an act unconstitutional is an exercise of the highest power of the court, and the necessity of such a decision must plainly appear. Here the defendant's offers had reference only to that part of the road over which plaintiff had been carried, and did not tend to prove the statutory rate unreasonable for the road as a whole, or for that part of it which was situated in Arkansas. The decision of the State Court (54 Ark. 101), that the correct test was the effect of the act on the defendant's entire line within the limits of the State, was followed; and the court therefore sustained the law for lack of proof going to this extent.

**CONTRACTS — DELIVERY IN INSTALMENTS — BREACH IN LIMINE — DAMAGES.** — Plaintiff contracted to deliver to defendant 30 bales of silk, — 10 bales July 25, 10 bales August 15, and 10 bales September 10. Plaintiff failed to make first delivery, and August 1 defendant gave notice that it cancelled the contract. Plaintiff could not have made the delivery due August 15, but was able to make the last one, had defendant permitted it.



*Held*, that defendant's refusal to receive further goods was unjustified, and plaintiff could recover damages as to the last instalment, but not as to the one which he could not have delivered in any event. *Gerli v. Poidebard Silk Mfg. Co.*, 31 Atl. Rep. 401 (N. J.), Van Syckel, J., *dissenting*. See NOTES.

**CORPORATIONS — BENEFIT SOCIETY — WHO ARE ENTITLED TO UNDISTRIBUTED FUNDS.** — All members of a mutual benefit society, organized under Friendly Societies Act (10 Geo. IV. c. 56), and all persons entitled to the distribution of funds under the Society's rules were dead, but the Society had not been dissolved, and a comparatively small sum remained in the hands of the trustees, who disclaimed all beneficial interest. *Held*, that this sum should be held as a resulting trust for the legal representatives of all who had ever been members in proportion to the amount of their contributions, and that an investigation must be had as to who had been members and as to the amount of their contributions, although this investigation would probably more than exhaust the funds on hand. *Cunnach v. Edwards*, 11 *The Times* Law Rep. 249 (Chan. Div., Chitty, J.). The Supreme Court of Maine, in a somewhat similar case of an incorporated mutual insurance company, held that the undivided sum should go to the State. *Titcomb v. Kennebunk Mut. Ins. Co.*, 79 Me. 315. This Maine decision seems an expedient one, but the English decision seems technically sound.

**CRIMINAL LAW — LOTTERIES.** — Where a tradesman offers a key to each purchaser of goods, and advertises that one among those given away will unlock a glass box which is displayed in the shop window and contains \$25, which sum is to become the property of the person receiving the right key: *Held*, sales of goods under such conditions are in effect a gift enterprise, and a conviction of the proprietor under a city ordinance against lotteries is proper. *Davenport v. City of Ottawa*, 39 Pac. 708 (Kas.).

The statutes against lotteries are usually drafted in very broad terms, and a great many of the chance schemes of enterprising dealers could be prevented by law if the prosecuting attorney chose to procure indictments. Thus, a newspaper coupon to each subscriber entitling the receiver to participate in a prize-drawing is a lottery ticket, *State v. Mumford*, 73 Mo. 647; to sell a number of packages of tea at the same price, in some of which a prize ticket is enclosed, is to conduct a lottery. *State v. Boncil*, 42 La. Ann. 1207; so to advertise that the proprietors of a certain establishment will give a gold watch to the customer who on a certain day guesses the number of beans in a certain jar, *Hudelson v. State*, 94 Ind. 426.

**CRIMINAL LAW — PROCEDURE — DUTY TO PASS SENTENCE — LOSS OF JURISDICTION.** — A prisoner after pleading guilty was allowed to go out of custody without bail. *Held*, the court had no jurisdiction more than three years afterward to rearrest and sentence him. *People v. Allen*, 39 N. E. Rep. 568 (Ill.).

The case decides that it is the duty of the court to sentence the prisoner within a reasonable time after a plea of guilty; that the court has not authority to suspend passing sentence an unreasonable length of time. So far the case seems thoroughly sound and in accord with authority. The case further holds that a breach of this duty to pass sentence within a reasonable time deprives the court of all further jurisdiction in the matter. There seems to be little authority on this point. None of the authority cited in the principal case bears on the second point. *Contra* are Beach, *New Criminal Procedure*, § 1291; *State v. Watson*, 95 Mo. 411. The result reached in the principal case — that those proven guilty of a crime or admittedly guilty must go unpunished — is very unsatisfactory. The doctrine of the Missouri case cited above as *contra* to the principal case on this point, better serves the ends of justice.

**CRIMINAL LAW — THE PRESUMPTION OF INNOCENCE — BURDEN OF PROOF.** — *Held*, that a refusal to charge that innocence is presumed till guilt is proved beyond a reasonable doubt, is erroneous, notwithstanding that the court does charge, fully and accurately, that the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt. *Coffin v. United States*, 15 Sup. Ct. Rep. 394. See NOTES.

**EQUITY — FRAUD AGAINST CREDITORS — PAYMENT OF PREMIUMS ON INSURANCE POLICY — EQUITABLE ASSETS.** — *Held*, that payments made by a debtor as premiums upon a policy of life insurance upon his own life, for the benefit of a wife and child, are essentially gifts to the beneficiary, and conclusively fraudulent and void as against creditors existing at the time of such payments. *Merchants' & Miners' Transportation Co. v. Borland*, 31 Atl. Rep. 272 (N. J.).

The decision seems manifestly right, and the doctrine is one established in England. See *Freeman v. Pope*, L. R. 9 Eq. 206; *Stokoe v. Cowan*, 7 Jur. (N. S.) 901; *Jenkyne v. Vaughan*, 25 L. J. Ch. 338. In U. S. the decisions are in conflict. In accord with the principal case are *Fearn v. Ward*, 55 Ala. 555; *Stigler's Ex. v. Stigler*, 77 Va.



163. *Barry v. Equitable Life*, 59 N. Y. 587, 593 (*semble*). *Contra*, are *Elliot's Appeal*, 50 Pa. 75 (*semble*); *Central Bank v. Hume*, 128 U. S. 195. For an exhaustive criticism of the latter case by Prof. Williston, see 25 *American Law Review*, 185.

EVIDENCE — DEED — COLLATERAL UNSEALED INSTRUMENT. — Plaintiff's intestate deeded land to defendant absolutely. At time of delivery of the deed both signed a separate unsealed instrument, stipulating that the deed was conditioned on the grantee's supporting the grantor for life. Both instruments were made for the purpose of effectuating a previous oral contract. Both were recorded. In an action of ejectment it was *held*, that the two instruments should be read together in determining the grantee's title under the deed. *Norton's Adm'r v. Perkins*, 31 Atl. Rep. 148 (Vt.).

It is well settled that parol evidence is admissible to show that a deed absolute on its face was really intended as a mortgage. The cases seem to limit this exception to transfers intended as security, and the principal case seems to go farther than any of the authorities.

INSURANCE — RECOVERY UPON AN ACCIDENT POLICY — LEGAL CAUSE. — Defendant company insured the plaintiff's intestate against accidents, but with a proviso that the policy should not cover suicide, intentional injuries or death resulting from disease. The insured accidentally shot himself. The wound resulted in tetanus, and on the eighteenth day he was found dead, with his throat cut and a scalpel in his hand. It was also evident that he had died in a tetanic spasm. *Held*, a charge was unexceptionable to the effect that, if the wound was an accident and produced tetanus, and if the insured was impelled to kill himself from the intense agony caused by the tetanus, then the jury might find that the pistol shot was the proximate cause of the death. Although the deceased cut his own throat and died from the direct effects of the cut. *Travellers' Ins. Co. v. Melick*, 65 Fed. Rep. 178.

This case is interesting as involving the doctrine laid down in *Schaeffer v. Ry.* 115 U. S. 249. It was suggested in 8 *HARVARD LAW REVIEW*, 176, that the question of whether an accident could be the proximate cause of insanity and subsequent suicide, should at least be submitted to a jury. This was practically the question submitted here, and a verdict for the plaintiff is sustained. The action in the above case sounded in tort, and the doctrine of proximate cause was invoked to measure the liability; while in the principal case the policy fixed the extent of the liability and the only question was whether death did result from the wound. The difference between the cases in principle, however, is not great, and this decision would seem correct in allowing a jury to pass upon the evidence.

PERSONS — CRIMINAL CONVERSATION. — *Held*, that a married woman cannot maintain an action for damages against one of her own sex, where the right of recovery is based solely on alleged adulterous acts between plaintiff's husband and the defendant. *Kroessin v. Keller*, 62 N. W. Rep. 438 (Min.).

Justice Collins rests his decision upon the distinction between an action simply in the nature of criminal conversation, and one founded on the substantive right of a wife to the society and protection of her husband. It is upon this ground, if at all, that the case is to be supported. *Haynes v. Nolin*, 129 Ind. 581; *Bennett v. Bennett*, 116 N. Y. 584.

The result arrived at by the court here embodies the spirit of the English rule that a husband alone can obtain divorce by merely proving the fact of criminal conversation, and expresses the general impression of the day that the male is the only sex which can be greatly damaged by violation of the marriage vow. There is little doubt that, at present, this decision would be widely approved in United States courts, especially whenever the effect of modern statutes upon the legal status of women has not been felt in its full force. But *quære* whether the social, as well as the legal, revolution in the relations of the sexes should not bear in a practical manner upon an action of this kind. There is at least one decision in this country which would seem to point in that direction. *Seaver v. Adams*, 19 Atl. Rep. 776.

PROPERTY — CONTINUOUS AND APPARENT EASEMENTS. — Plaintiff and defendant purchased a building which consisted of two dwellings exactly alike. Each simultaneously took a separate deed of his dwelling and his respective half of the land on which the building was located. Each dwelling was supplied with water from a well somewhere upon the land. The only part of the water-supplying apparatus visible was a pump in each kitchen. The well was afterwards found to be on defendant's land and he shut off plaintiff's water supply. *Held*, the right to water from this well passed to plaintiff with his deed, it being a continuous and apparent easement. *Larsen v. Peterson*, 30 Atl. Rep. 1094 (N. J.).

This decision follows *Pyer v. Carter*, 1 H. & N. 916, and is *contra* to the *dictum* in *Suffield v. Brown*, 4 De G. J. & S. 185, which has been followed in many jurisdictions.

The only question arising in the case was whether this was an apparent and continuous easement, the Vermont court recognizing no distinction between the reservation and grant of easements of this character upon the severance of the tenement.

**PROPERTY — DEEDS — BOUNDARY ON A HIGHWAY.** — Land bounding on a highway was described in a deed by metes and bounds, but no mention was made of the highway. *Held*, the deed carried the fee to the middle of the highway. *Grant v. Moon*, 30 S. W. R. 328 (Mo.).

The doctrine finds support among such text-writers as Elliot and Angell, and is also law in Connecticut. *Champlin v. Pendleton*, 13 Conn. 23; *Gear v. Barnum*, 37 Conn. 229. New Jersey, however, holds otherwise. *Hoboken, etc. Co. v. Kerrigan*, 31 N. J. Law, 13. It is submitted that the New Jersey doctrine is the better. A presumption that the grantor intended to convey the fee to the middle of the highway must be gathered from the language of the deed, and where the deed does not mention a highway, or show that the grantor knew that one existed, the presumption should rather be that the land was intended to pass as described.

**PROPERTY — DEEDS — BOUNDARY ON A HIGHWAY.** — In connection with the foregoing case, the following may be noticed.

H and G streets crossed each other, G running east and west. A deed described land as follows: "Beginning . . . at the southeast corner or intersection of H and G streets, and running thence easterly, bounding on G street, 25 feet, then southerly . . . to a nine foot alley; then westerly, bounding on said alley, to H street, 25 feet; and thence northerly, bounding on H street, to the place of beginning." *Held*, the deed did not carry the fee to the middle of H street. *Rieman v. Baltimore Belt Ry. Co.*, 31 Atl. Rep. 444 (Md.).

The court argues that the starting-point is fixed by the words "southeast corner" at the intersection of the sides of the streets, and that if one end of a boundary line is at the side of a highway, no presumption can carry the other end out into the centre. The case is opposed to the weight of American authority, which holds that even if there is a fixed monument on the side of the highway, a boundary "running thence along the highway" will carry the land in its entire length to the centre of the street. The Maryland court is, however, consistent in following its earlier decisions on this subject.

**PROPERTY — DEEDS — CONSTRUCTION.** — An instrument was executed to appellants with all the formalities of a warranty deed, but contained a clause that the deed was to be of no effect until after the death of the grantor and then to have full force. *Held*, that a present interest in the land passed to the grantee but the full enjoyment was postponed until the grantor died. *Wilson v. Carrico*, 40 N. E. Rep. 50 (Ind.).

At common law it was a perfectly well settled principle that a freehold to commence *in futuro* could not be conveyed, as the title would be in abeyance; and to have the title in abeyance for ever so short a time was against all principles of feudal law, which required that there should always be a known owner of every freehold estate. However, under a statute in Indiana a freehold estate to commence *in futuro* may be created. Having disposed of the difficulty with which we would have been met had the deed in the present case come up in a jurisdiction where the common-law rule as to this point still held, the decision in the principal case seems to be satisfactory. The instrument was not intended to be a devise as the words used were, "convey and warrant," plainly importing an intention to convey a present estate to the grantor. The deed was also duly recorded like any other deed. The decision of the court certainly carries out the intention of the parties and though the deed is a curious affair, allows it to stand, thus giving the grantor in effect a life interest in the land with remainder to the grantee in fee. Instruments of a very similar tenor have been upheld in *White v. Hopkins*, 4 S. E. Rep. 863; *Graves v. Atwood*, 52 Conn. 512; *Webster v. Webster*, 33 N. H. 18; *Abbott v. Holway*, 72 Me. 298; and other cases.

**PROPERTY — DISTRIBUTION — DEBT DUE FROM HEIR.** — Where a judgment lien attached to land immediately on its descent to the heir, it was *held*, that the administrator was entitled to subject the lands to the payment of a debt due by the heir to the estate, in preference to the claims of the judgment creditor. *Streety v. McCurdy*, 16 So. Rep. 686 (Ala.).

As the court admit, what authority there is on this point is contra. See cases cited. The Alabama case, *Nelson v. Murfee*, 69 Ala. 598, upon which the decision is primarily rested, decided the same question in regard to the proceeds of real estate in the hands of the administrator. This case seems also against the weight of authority. *Smith v. Kearney*, 2 Barb. Ch. 533; *Sartor v. Beatty*, 25 S. C. 293; *La Foy v. La Foy*, 43 N. J. Eq. 206. The last case points out the distinction between allowing this set-off in regard to



personalty and in regard to realty, the latter passing directly to the heir or devisee without the aid of the administrator. However, the rule of the principal case commends itself as eminently practical, and might well be supported on that ground.

**PROPERTY — ESTATE TAIL — CURTESY.** — A testator devised land to his daughter A., her heirs and assigns forever, "providing that she dies leaving lineal heirs of her body;" but, in case she dies "leaving no child or children or descendants," he gave the land to B. In an action of ejectment by B. against A.'s husband, *held*, that A. took an estate tail, and therefore, upon her death, the defendant became tenant by the curtesy, notwithstanding the death of all issue during A.'s life. *Holden v. Wells*, 31 Atl. Rep. 265 (R. I.).

The law deals kindly with a testator's intentions, and often carries them into effect regardless of the strict rules which otherwise control the creation of estates. The only question here is whether the testator's words can be said to point to an estate tail as the object of his intentions, and there is certainly authority for using them in that sense. 1 Washb. Real Prop. 105. It is immaterial to the case, however, whether this be an instance of an estate tail determining by failure of issue or of a fee determining by executory devise, since it is perfectly settled law that both are exceptions to the general rule denying curtesy after the determination of the principal estate. 4 Kent's Comm. \*34.

**PROPERTY — MORTGAGE SALE — FOREIGN ADMINISTRATOR — RIGHT TO EXECUTE POWER OF SALE.** — Bill to enjoin the completion of a sale of land in Rhode Island under a power of sale contained in a mortgage by complainant to W. C., deceased, late of Massachusetts. Respondent, having been duly appointed administrator in Massachusetts, sold the land at public auction under the power, which ran to the mortgagee, his executors, administrators, and assigns. *Held*, though a foreign administrator, he could execute the power in Rhode Island. *Thurber v. Carpenter*, 31 Atl. Rep. 5 (R. I.).

The court admits that it has been held that a foreign administrator cannot assign a mortgage where the legal title to the land is affected, because foreclosure or a writ of entry might be necessary to enforce the right under the mortgage, and a foreign executor could give no right which he could not himself exercise. The present case is distinguished on the ground that the rule is inapplicable to the modern form of mortgage with a power of sale, which does not require foreclosure proceedings. In such a case, an administrator is regarded as acting "not strictly in his official capacity as the representative of the deceased mortgagee, but rather as a *persona designata*, and so, as the appointee of the mortgagor," exercising the power "by virtue of the contract between the parties." The authority upon the point seems meagre, but the cases cited sustain the proposition enunciated. *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Hayes v. Frey*, 54 Wis. 503; *Holcombe v. Richards*, 38 Minn. 38.

**QUASI-CONTRACT — ATTACHMENT — ACTION ARISING ON CONTRACT.** — On appeal from an order of the circuit court discharging an attachment, the Supreme Court of South Dakota *held*, that the attachment should not have been discharged, as a judgment of a sister state was a contract within the words "action arising on contract" as used in the attachment law, and that it was immaterial whether the judgment was founded on a tort or on a contract. *First Nat. Bank of Nashua v. Vanvooris*, 62 N. W. Rep. 378 (So. Dakota).

Though the court admits that a judgment is not a true contract, but a quasi-contract, it says that the legislature must have used the word "contract" in the statute in the sense of an action *ex contractu* as distinguished from an action *ex delicto*. This is giving rather a broad interpretation to the word "contract." The two kinds of obligations are entirely distinct, and if the legislature meant to include quasi-contracts in the attachment law, it should have said so, as the Nebraska legislature has done. It would seem that the interpretation of the lower court was the more satisfactory, and it has no respectable weight of authority to support it. Black on Judgments, vol. i., §§ 8, 11, and cases cited, and Keener on Quasi-Contracts. Especially does the Supreme Court seem to be legislating rather than simply construing a statute, when it says that it is immaterial whether the judgment arose from a tort or a contract. Where a judgment is founded on a tort it seems almost impossible to call it a contract, and it is held on the best authority that such a judgment is not a contract within the meaning of that clause of the federal Constitution providing against the impairing of the obligations of a contract. *Louisiana v. Mayor*, 109 U. S. 285, 3 Sup. Ct. 211, and text-books above cited.

**QUASI-CONTRACT — MISTAKE OF FACT — MONEY PAID UNDER PRESSURE OF LEGAL PROCESS.** — The defendants issued a summons against plaintiff to recover his proportion of certain street improvement expenses alleged to be due from him as an abutting owner. The plaintiff paid the money before the summons was heard, and the summons was withdrawn. The plaintiff, having discovered that his premises did not abut

on said street, brought an action to recover the amount paid in. *Held*, that the money having been paid under compulsion of legal process, could not be recovered back. *Moore v. Vestry of Fulham* (1895), 1 Q. B. 399.

This decision shows that the fact that the money was paid under a mistake of fact, does not take the case out of the rule, well established since the case of *Marriot v. Hampton* (7 T. R. 269), that money paid under pressure of legal process cannot be recovered back, even though it be against the conscience of defendant to keep it. The decision shows further that the *dictum* of Lopes, L. J., in *Caird v. Moss*, 33 Ch. D. 22, 36, seeming to limit this doctrine to cases where the process still stands, is not law.

**SALES — PLEDGE — PLEDGOR AGENT OF PLEDGEE.** — Plaintiff redelivered bill of lading which he held in pledge, to pledgors, with power to sell as his agent. Pledgors sold to A & Sons, and subsequently failed. Action brought to determine whether plaintiff, the pledgee, or the creditors of the bankrupt pledgors were entitled to the balance of the purchase money in the hands of A & Sons. *Held*, that pledgee might constitute pledgor his agent to sell without losing his lien; and that plaintiff, therefore, was entitled to the money in question. *North Western Bank v. Poynter et al.* (1895), App. Cas. 57.

This case, which came up in the House of Lords on an appeal from the Court of Session, Scotland, settles the law for Scotland in accordance with the English and American law on this point.

**STATUTE OF LIMITATIONS — WHEN IT BEGINS TO RUN — CONCEALED TRESPASS.** — Defendant excavated coal inadvertently under plaintiff's land. Plaintiff had no reasonable means of discovering the trespass, and did not learn of it until seven years afterward. *Held*, that in case of trespass to or in a lower stratum, which plaintiff had no reasonable means of discovering, Statute of Limitations does not begin to run until the discovery of the trespass. *Lewey v. H. C. Frick Coke Co.*, 31 Atl. Rep. 261 (Pa.). See NOTES.

**TORTS — DECEIT.** — The officers of F. Bank made four reports to the Comptroller as required by the provisions of the National Banking Act. The officers also published and mailed to plaintiff a statement, not required by law, representing the bank to be in a flourishing condition. All these statements were known by those making them to be false. Plaintiff, believing these statements to be true, and relying on them, discounted a note solely on the security of shares of F. Bank. These shares turned out to be worthless. *Held*, under these circumstances, F. Bank was not liable for the loss sustained by plaintiff. *Merchants Bank v. Armstrong*, 65 Fed. Rep. 932.

It is submitted that in making and publishing these statements the bank officers were acting within the scope of their authority; that the deceit was therefore, as regards liability in a civil action, that of the bank itself.

It is doubtless true that these statements were not issued for the purpose of being used in the manner in which they were used by plaintiff. It is equally true that had defendants thought, they must have realized that these statements would be used in the manner in which they were used by plaintiff. The court might have held defendants liable under these circumstances, citing in support of such decision *Bedford v. Bagshaw*, 4 H. & N. 538.

**TORTS — MALICIOUS INTERFERENCE WITH BUSINESS.** — The defendant, a delegate of a trade union, induced the plaintiffs' employer to discharge them, his sole object being to injure the plaintiffs. *Held*, that this was an actionable wrong, whether it involved a breach of contract or not. *Flood v. Jackson*, 11 *The Times Law Rep.* 276 (Q. B. D.).

Affirmed in the Court of Appeal, 11 *The Times Law Rep.* 335. The case is a direct decision on the point of malicious interference, all suggestion of conspiracy and breach of contract being put aside. The discussion by the court does not remove the difficulties of the case, but probably the best result has been reached. The doctrine is reviewed in a recent note in 8 *HARVARD LAW REVIEW*, 499, and seems to be gaining favor everywhere. See *Graham v. St. Charles St. R. Co.*, 16 So. Rep. 806 (La.), in which the same decision is made.

**TORTS — TURNTABLE CASE.** — *Held*, that a railroad company maintaining on its land a properly constructed turntable owes no duty to take precautions against injuries which may be suffered by children playing on it. *Walsh v. Fitchburg Ry. Co.*, 39 N. E. Rep. 1068 (N. Y.), reversing *Walsh v. Fitchburg Ry. Co.*, 28 N. Y. Supp. 1097. See NOTES.

**TRUSTS — FRAUDULENT PURCHASE BY AGENT.** — Plaintiff employed defendant, his attorney-at-law, to purchase an interest from plaintiff's brother. The lawyer paid his own money, and was allowed to take a conveyance in his own name but only by repre-



senting to the brother that he was purchasing for plaintiff. Defendant refused to convey to plaintiff, although the latter tendered full compensation. *Held*, defendant is constructive trustee for plaintiff. *Haight v. Pearson*, 39 Pac. Rep. 479 (Utah).

A sound case. By means of his fraudulent representations, defendant caused plaintiff damage, — a tort, for which equity will allow specific reparation. It would seem that the stress put by the court upon the confidential relations between lawyer and client was unnecessary. The fact that the conveyance was procured by fraud makes it needless to consider what effect the Statute of Frauds would have upon such an oral understanding between principal and agent. *Onson v. Cown*, 22 Wis. 329. *Cipperly v. Cipperly*, 4 Thomp. & C. 342 accord. See also *Lombard v. Cowham*, 34 Wis. 486.

TRUSTS — PRINCIPAL AND AGENT — FOLLOWING TRUST FUNDS. — Defendant's intestate had been the New York agent of plaintiffs, buying and selling goods for them. Interest was charged on the balances against whichever party happened to be the debtor, and settlements were made semi-annually. At the last settlement before deceased's death plaintiffs had been indebted to him, but had since remitted drafts discharging the debt and leaving a balance due them; and the avails of the drafts remitted after the indebtedness had been discharged could be distinctly traced into deceased's bank account. *Held*, plaintiffs can prevail against deceased's general creditors on the principle that "where the principal can trace his property into the hands of his agent, he may follow and reclaim it." "Because deceased was plaintiffs' agent, the property received by him became impressed with a trust character." *Roca v. Byrne et al.*, 39 N. E. Rep. 812 (N. Y.).

The court seems to have entirely disregarded the fact that "interest was paid on the balances." The payment of interest, it is submitted, shows conclusively that the deceased received the money as debtor, and not as trustee. "If a man pays interest for money, he must be entitled to the use of it." *Ex parte, Broad*, 13 Q. B. D. 740.

TRUSTS — STATUTE OF FRAUDS — PAROL AGREEMENT TO HOLD IN TRUST. — Plaintiff conveyed land to the defendant, his sister, without consideration, and in reliance on her parol promise to hold in trust for him. Plaintiff brought action for reconveyance. *Held*, that the case fell within the Statute of Frauds, and that the plaintiff was not entitled to reconveyance. *Hutchinson v. Hutchinson*, 32 N. Y. Sup. 390. See NOTES.

WILLS — REVOCATION — SECOND CODICIL — INTENTION TO REVOKE FIRST CODICIL. — After testator had made his will and a first codicil, his wife died. He then made a second codicil, nowhere referring to the first, but only to the will. By this codicil he appointed the same executors which he had by the first codicil, gave legacies of the same sums to the same persons, gave the same directions as to his place of burial and a monument for himself, and devised an India shawl again to his sister-in-law, as he had done in the first codicil. But he made a gift of £400 to Mary Alridge, whereas by the first codicil he had bequeathed her £200. He also omitted a revocation of a gift of jewelry and other articles to his wife, and the subsequent gift of £5,000 to his sister, Julia Stainforth, and substituted for it a direction to the trustees to set aside £5,000 out of the residue for such sister. In all other respects the language of the second codicil was identical with the first. *Held*, testator intended to revoke the first codicil and substitute for it the second, and that probate should go of the will and second codicil only. *Chichester et al. v. Quatrefuges et al.*, 11 *The Times Law Rep.* 328.

The case is interesting as showing how a probate judge looks entirely at the intention of the deceased to find out what documents he or she meant to operate as his or her will. The court says that extrinsic evidence may be freely made use of; but, as there is none, the instruments show on their face the intention of the testator merely to repeat the first codicil by the second, the strong points being, the fact that he referred only to the will in the second codicil, and (apart from the change in the amount of the legacy to the nurse effected after the second codicil had been engrossed) the codicil expressed only the legal effect of the first, having regard to the fact of the supervening death of the testator's wife, and the fact that the specific legacies of sums of money and articles were identical in both. There would seem here to be sufficient evidence to maintain the construction of the court as to the testator's intention. The Wills Act (1 Vic. c. 26, § 20) says nothing in regard to what will or codicil, being duly executed, will revoke a former one, and consequently it has now become settled that no express revocation is necessary, but that a revocation by implication is sufficient. It was on this ground that the court proceeded in the principal case, following *Jenner v. Finch*, 5 P. D. 106, and *Demsey v. Lawson*, 2 P. D. 98.

## REVIEWS.

THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. By Sir Frederick Pollock and Frederick William Maitland. Cambridge, England: At the University Press. 1895. 2 vols. 8vo.

This work, awaited with eager anticipation by all interested in legal history, came to hand so recently that the examination that its great merits demand must be postponed to a later number of the Review. There is only opportunity here to remark that the distinguished authors have thrown a flood of light upon the darkest period of English law, the two centuries following the Norman Conquest, and have been singularly successful in giving the result of their investigation in a form to excite and hold the interest of the reader.

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NEW CRIMINAL PROCEDURE. By Joel Prentiss Bishop, LL.D. Fourth Edition, Vol. I., General and Elementary. Chicago: T. H. Flood & Co. 1895. 8vo. pp. xxvi, 921.

It is always pleasant to get a new volume from Mr. Bishop's pen, even if it is only a new edition. This book has novelty of form, at least. A large part of it has been entirely rewritten, not with any change of sense, but to make the meaning clearer and the language more concise.

His series of works upon the Criminal Law is probably Mr. Bishop's chief contribution to legal learning; and most lawyers will recognize the singular value of it. The subject had enlisted the best efforts of such lawyers of genius as Coke, Hale, Hawkins, Foster, and East; yet Bishop found it a congeries of imperfectly related doctrines, and has left it a science.

The ability of our author rightly to deduce legal principles, and the difference between his methods and those of the ordinary compiler of text-books, is strikingly shown in § 220, in the chapter on Extradition, where the phrase "fleeing from justice" is discussed. In the third edition the paragraph stood thus: "Hence *it seems that* if one commits a crime in a State in which he is not personally present,—as in various circumstances he may,—there is no means by which he can be transferred, against his will, to the place of its commission to be tried,—*a question not, probably, judicially determined.*" In the present edition the words in italics are omitted, and two recent cases are cited in support of the proposition. A still later case may be remembered as having caused considerable discussion,—*State v. Hall*, 20 S. E. 729 (see 8 HARVARD LAW REVIEW, 494). Mr. Bishop, it would seem, nowhere cites two earlier cases to the same effect,—*Jones v. Leonard*, 50 Ia. 106, and *Hartman v. Aveline*, 63 Ind. 344. Both cases were decided in 1878, two years before the date of the third edition.

Another important case which seems to be omitted is *Castro v. Reg.*, 6 App. Cas. 229. The omission of it is the more remarkable, because it fully supports our author's vigorous attack upon the doctrine of *People v. Liscomb* (§ 458, note 1). One cannot assert too positively that the case is nowhere cited, because there is no Table of Cases for this volume,—a serious defect, though of course the table will appear in the second volume when it is issued.



But assuming the worst to be true, and that these and perhaps other important cases have been overlooked, Mr. Bishop, while occasionally omitting an authority, is far more accurate, useful, and trustworthy than most writers who point with pride to the fact that their book cites every decided case on the subject.

No law book to-day ought to omit references to the National Series of Reporters. Without discussing their intrinsic value, its wide use among lawyers renders such a course proper. It is a serious defect in this volume that there seems not to be a reference to that series; even the Federal Reporter is neglected.

J. H. B.

#### ADOPTION AND AMENDMENT OF CONSTITUTIONS IN EUROPE AND AMERICA.

By Charles Borgeaud. Translated by Charles D. Hazen, Professor of History in Smith College, with an Introduction by John M. Vincent, Associate of the Johns Hopkins University. New York and London: Macmillan & Co. 1895. pp. xxi, 353. Price, \$2.00.

It is a good thing thus to present to our people a translation of Dr. Borgeaud's accurate and valuable treatise,—*ouvrage couronné par la faculté de droit de Paris, Prix Rossi*, 1892. The Introduction states that "the co-operation of the author has been freely given in bringing up to date the changes which have taken place since 1892." "The Origin, Growth, and Character of Written Constitutions" is considered in forty-three pages. "Royal Charters and Constitutional Compacts: I. The German Group; II. The Latin-Scandinavian Group," in eighty-two pages. "Democratic Constitutions: I. United States of America; II. France; III. Switzerland," in two hundred pages. And there is interesting matter in a "Preface" and a "Conclusion."

Dr. Borgeaud's constitutional writings rank among the most careful, the best-informed, and the most instructive for American readers that are to be found anywhere. This translation seems to be generally good. It is odd, however, to see the famous "Council of Revision" of the first New York Constitution filtering back into English as the "Committee on Amendments," through Dr. Borgeaud's accurate enough "*Comité de révision*." An American translator should not have repeated Dr. Borgeaud's slip in citing the case of Woods's Appeal from 75 Penn. State Records. And when Dr. Borgeaud says that "*la jurisprudence des faits*" has vindicated a certain opinion, "the course of events" seems but a faint equivalent for the striking phrase of the original.

#### SELECT PLEAS IN THE COURT OF ADMIRALTY. Vol. I. Being Vol. VI. of the Publications of the Selden Society. Edited by Reginald G. Marsden. London: Bernard Quaritch. 1894.

After a delay of more than two years the publications of the Selden Society are continued, and the series will, we are assured, within a few months be brought up to date. The present volume, while less interesting perhaps to American lawyers than the preceding publications, or those immediately to follow, nevertheless contains much of value. An elaborate introduction discusses satisfactorily the origin of the Admiral's jurisdiction. It appears to have arisen out of the inability of the common law to deal with matters which happened beyond the knowledge of "the country." That jurors could not usually pass on facts happening out-

side their county was held for centuries after the Admiral's court had been established. Piracy, for instance, was anciently tried by the common law; but in 1429, according to Mr. Marsden, the jurisdiction of the common law fell into desuetude. The reason given by Lord Coke for this fact was that just indicated,—that no jury could be found which knew of the piracy (Co. Lit. 391a; 13 Co. 51). The Admiral, sitting without a jury, could find the truth of facts wherever they happened. In view of this reason for the establishment of a court of Admiralty, it is curious to notice that in a few instances a jury was summoned into the court (pp. 35, 89, 122).

The series of records of the court does not begin till 1524, though its establishment was as early as the middle of the 14th century. There were at first several courts,—there being an Admiral of the West, an Admiral of the North, etc. Two records from the Court of Admiralty of the West (of the years 1390 and 1404) are here printed, having been removed by *Certiorari* into Chancery, and there preserved. Both records deal with alleged unlawful acts of the officers of the court. The other records here printed fall between the years 1527 and 1545.

As was natural, the jurisdiction of the Admiral was not at first sharply defined, and proceedings in Admiralty for contempt in suing in other courts, and writs of prohibition to the Admiral, were common pastime. The bulk of business was like that at present. Cases involving the law of shipping were much the most frequent; and there were many prosecutions for piracy, and disputes as to the title to vessels. Torts also were commonly dealt with; not exclusively what we should now regard as maritime torts. One is surprised, for instance, to find between 1527 and 1541 two actions of slander,—jurisdiction apparently being taken because the words were spoken on shipboard.

Several interesting documents are printed,—bills of lading, charter-parties, bills of sale, and bottomry bonds, or bills obligatory. An analogy between the bottomry bond and the policy of insurance is suggested by the case of *The George Duffield* (p. 106). Money having been lent on bottomry, the vessel was cast away at St. Michael's, not having completed the voyage. Recovery was nevertheless claimed on the bond upon two grounds,—that the vessel was unseaworthy when she sailed, and that the master had abandoned her rather than repair and complete the voyage.

The editor mentions a libel upon a policy of insurance in the year 1550,—a very early example of such a suit. It is a pity that the printing of the records is not brought down far enough to include the case.

An excellent and artistic reproduction, in copper, of the seal of the Court of Admiralty accompanies the volume.

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THE ELEMENTS OF JURISPRUDENCE. By Thomas Erskine Holland. D.C.L. Seventh Edition. Oxford: Clarendon Press, 1895. 8vo. pp. xx, 402.

Mr. Holland's book, first published in 1882, has never gone four years without a new edition, and as a treatise on Jurisprudence deserves the popularity which the new editions show that it has enjoyed. Eminently readable, never digressing, as Austin does, to wrestle with giants which do not lie in its path, it furnishes a compact view of the essentials of law from an Anglo-Saxon standpoint. It is never to be forgotten, however,



that Mr. Holland frankly stays at this standpoint. He digresses, when he does digress, into saying that the English law on this point is so-and-so; and those digressions, while they cannot injure, mar the otherwise straightforward consistency of his attachment to his plan.

One point in his classification seems not so good as it might be. Mr. Holland includes in rights *in personam* those legal phenomena which occur when a carrier or an innkeeper is bound by his calling to certain relations with travellers. Now, it is absurd, or at least useless, to discuss the right which all the world have to the service of an innkeeper as the right of special persons. It serves no purpose to say that Mr. Holland has a right to be carried on the Central Pacific Railway. The relation which that phrase expresses is better to be spoken of as the railway's duty than as the right of any member of the public. It is therefore submitted that a better classification than

Rights  $\left\{ \begin{array}{l} (a) \text{ } In \text{ } rem. \\ (b) \text{ } In \text{ } personam. \end{array} \right.$

is the following:—

Relations  $\left\{ \begin{array}{l} (a) \text{ } Rights \text{ } in \text{ } rem. \\ (b) \text{ } Rights \text{ } in \text{ } personam. \\ (c) \text{ } Duties \text{ } in \text{ } rem. \end{array} \right.$

This last class includes such duties as a carrier's, a public official's, &c. Sir Frederick Pollock has spoken of this as a defect in classification. It is more than merely that. It has led Mr. Holland to neglect the very important third class.

As one turns over the pages and sees the apt use which is made of American authorities, one is led to a regret, which cannot include blame, that Mr. Holland has not gone farther in our field. The criticism of Coke's phrase about "An Act . . . against Common Right" (and therefore void) might well be illustrated with Mr. Justice Gray's learned note to *Paxton's Case*, Quincy (Mass.) 51, which treats of the American cases on that point. Some mention of the rout of the Illinois notion of degrees of negligence in the recent reports would seem worth while. So also Mr. Holland's point on page 116 about the rights of the State as such, which he illustrates by the form of prosecution. *The Queen v. A. B.*, and *People v. A. B.*, would be more neatly illustrated by the far more common American form, *The State v. A. B.*, of which he seems to be unaware. And other illustrations might be multiplied if there were not a fear that they might be thought to indicate something wanting. The book is not wanting in good illustrations. Indeed, it is their aptness and number which make one wish that little points like those just mentioned could have been looked on with the aid of every American doctrine or practice which could help on the good work.

R. W. H.

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DES CONTRATS PAR CORRESPONDANCE. Par Jules Valéry. Paris: Thorin et Fils, 1895. pp. xvi, 461.

It is very refreshing to find some of the subjects which are well threshed out in our common law jurisdictions discussed by a foreigner in the lights in which the needs of his law present them to him.

In the first place the question of the time of acceptance and offer is thoroughly discussed, with a good bibliography; and the respective the-

ories are neatly ticketed. M. Valery inclines strongly to the rule prevailing in England and the United States, — the theory of "declaration," as opposed to the theory of "information" (*i. e.*, as opposed to the doctrine of *M'ulloch v. Eagle Ins. Co.*, 1 Pick. 277). He would be willing to carry this in some respects much farther than it has been carried here, and would, for instance, hold that the entry by a merchant (in the books which he is required by French law to keep) of an acceptance should bind the other party. One, however, who was not bound to keep books should not, he says, be able to bind the offerer until he mails his answer. The hardship of this doctrine upon an offerer who does not hear of his acceptance is to be completely obviated by an obligation imposed upon the acceptor *ex bono et æquo*, corresponding to our condition or contract implied by law, to see that the offerer is duly informed of the acceptance, — a suggestion worth consideration here.

Those idealists who feel that the foreign commercial law has none of the faults of our own will be disappointed to find that the doctrine which makes acceptances binding for the benefit of those who take on the faith of them, though they be not on the bill, is at least not unknown abroad. M. Valery states as law that they are binding, and backs it up by citing decisions (p. 223). He seems, it may be added, to be well wonted to the use of decisions as authority, and to place much reliance on them.

In many other respects (for instance, the scope of tacit contracts), the book will prove interesting to any reader.

R. W. H.

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**THE LAW OF JUDICIAL WRITS AND PROCESS.** By W. A. Alderson, of the New York Bar. New York: Baker, Voorhis, & Co. 1895. 8vo. pp. lix, 667.

In a great system of law, it is useless to try to memorize much, when one has but to peep into a few good books to find what is needed; but there are some rules that every lawyer must in practice have at his fingertips, and the law of judicial writs and process includes an unusually large number of such points. As this most important branch has never, hitherto, been at all fully or adequately treated, the profession will welcome in Mr. Alderson's book a work conscientious in its thoroughness, and sincere in its attempt to discuss aggressively and carefully each and every doctrine of that law. Far more authorities on this subject are gathered here than can, probably, be found anywhere else; and although this collection is hardly exhaustive (important authorities treating of this topic in 1 Ames and Smith on Torts are not, for example, referred to), yet it shows throughout a vast amount of diligence and labor.

The student might, however, complain with some justice of certain features of the work. It is, perhaps to some extent, presented in an unnecessarily expanded and undigested form; and the sense of proportion, and true test of really fundamental sifting and classification, is not always properly maintained.

Although in these respects, perhaps not thoroughly satisfactory to the student, the book will, undoubtedly, prove valuable to every practitioner wherever located, and can hardly fail to assume a well-merited and respectable position in the ranks of recent legal publications.

D. A. E.



RULES OF EVIDENCE. By George W. Bradner. Chicago: Callaghan & Co., 1895.

This book aims to occupy a middle position between exhaustive treatises, like *Greenleaf*, and digests, like *Stephen*. Although the author follows in the main *Stephen's* classification, his statement and explanation of the principal rules of evidence are fuller. On the other hand, no attempt is made to follow out the law into all its ramifications. The book is not intended to take the place of the large standard treatises such as *Greenleaf* and *Best*. Accordingly, the older cases are not cited where there is recent authority in point. The author writes for American lawyers, and seeks especially to present to them in small compass the results of the more recent decisions in this country. He says at the close of his Introduction: "All we propose to do is to collate the work of the judges, and put it into a concise form for the use of the profession." To this modest plan he has adhered throughout. One could wish there were more of the author's own comment and criticism in the work. Busy lawyers in search of the latest decisions in American jurisdictions will find Mr. Bradner has done them good service by his abstracts.

F. B. W.

A TREATISE ON THE FEDERAL INCOME TAX OF 1894. By Roger Foster and Everett V. Abbot. Boston: The Boston Book Co., 1895. pp. ix, 546.

This volume appeared just long enough before the recent decision upon the constitutionality of the income tax, which it in a great degree foreshadowed, to give its authors an opportunity to establish a reputation for prophecy, though their preface disclaims any such ambition. As its size would indicate, it is the most exhaustive manual that has yet appeared upon the subject. Indeed, it leaves little to be said further in any direction, — only a brief could be more thorough.

To the student of politics and economics the short historical sketch, including extracts from the debates on taxation in the Convention of 1787, will be interesting; while the busy lawyer, compelled to prepare a brief on short notice, will appreciate the carefully written chapters on the incidence of the tax and the income subject to it, as well as the abundance of cross references, and the copious citations from cases, department rulings, and former acts. Persons subject to the tax, also, will find a full collection of fac-simile forms with directions for use, well calculated to keep them from making faulty returns. If a full bench of the court declares the remainder of the act unconstitutional, the chapter devoted to "Remedies of the Taxpayer" will be invaluable to those unfamiliar with the unwonted procedure of recovering a tax.

Altogether, whether one wishes to pay his tax properly, or to resist it successfully, this manual will be found equally useful.

J. P. H.

AMERICAN ELECTRICAL CASES, with annotations. Edited by William W. Morrill. Albany: Matthew Bender. 1894, 1895. 8vo. Vol. I 1873-1885, pp. xxi, 894; Vol. II. 1886-1889, pp. xxi, 915.

At a time when the tendency toward specialization in law is daily increasing, a collection of cases, on so important a subject as electricity, is sure to be well received. The editor of "American Electrical Cases"

proposes to make, in effect, a new series of reports, devoted exclusively to this subject. The number of cases is already so considerable that several volumes will be required to bring the work down to date, after which a new volume is to be added as often as the further accumulation of cases demands. It is needless to remark on the many advantages of such a plan. The first two volumes are at hand, and bear evidence of much careful preparation. The cases are well arranged, the annotations numerous, and the index a model for all books of this class. A. K. G.

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THE UNITED STATES INTERNAL REVENUE TAX SYSTEM, embracing all Internal Revenue laws, now in force, as amended by the latest enactments. Edited by Charles Wesley Eldridge. Boston and New York: Houghton, Mifflin, & Co. 1895. 8vo. pp. vii, 722.

Mr. Eldridge's book is not a commentary. Its object is to present a reliable statement of the whole law of internal revenue taxation, as it exists to-day, with a digest of decisions and rulings, placed under the sections to which they relate. The book has been carefully prepared by one who had a hand in revising the internal revenue laws, and will doubtless be found a helpful guide to all who have occasion to explore the wilderness of the revised statutes on the subject. An improvement might be suggested in the facilities for reference and cross reference. "Compare with sec. 118, Act June 30, 1864, as amended, *infra*," and "see Appendix," are perhaps not as precise references as could be desired, where sec. 118 is in another chapter, and the Appendix occupies forty pages.

A. K. G.

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OLIVER'S PRECEDENTS AND FORMS OF PRACTICE. Fifth edition. By Bordman Hall, LL.B. Boston: Little, Brown, & Co. 1895. 8vo. pp. xlviii, 773.

Although this treatise was originally published in 1842, it has managed to survive the various codes and practice acts, and to attain a high rank in the esteem of practitioners of the day, who find that the need of common forms and precedents has by no means disappeared. This useful work has generally succeeded in filling an important place, and the present edition promises to enhance its value in the future. A great deal of what was unnecessary or obsolete has been omitted, much has been rewritten, and convenient improvements have been made in the classification and indexing of the material. Many new precedents have been added, and States outside of New England have not been as entirely neglected as in the past. The scope of the work has, on the whole, been well recognized, and its objects carried out with creditable success.

D. A. E.

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HANDBOOK OF CRIMINAL PROCEDURE. By William L. Clark. St. Paul: West Publishing Company. 1895. (Hornbook Series.) 8vo. pp. viii, 658.

This, the latest Hornbook, represents in a great degree the general nature of this useful little series. It is characterized by the same virtues, and to some extent by the same defects, that have been pointed out in previous reviews. It aims to afford to the student a rapid and comprehensive view of the subject of criminal procedure, and, on the whole, does



this well. Its flaws — occasional errors arising from lack of nice discrimination — are ones which are, perhaps, not easily avoidable in a work of this sort, of which not the least valuable portion is the brief and almost necessarily dogmatic statement of rules. This volume will, doubtless, take a deservedly high position in a series in which some of the best work has been contributed by its author, Mr. Clark. D. A. E.

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THE INSURANCE AGENT: His Rights, Duties, and Liabilities. By John A. Finch. Indianapolis: The Bowen-Merrill Company. 1894. pp. viii and 36.

This little book is a reprint of a series of articles written by a lawyer for the use of fire insurance agents. It is chiefly composed of brief notes of propositions of law, with references to cases. The reasons for the propositions are not given, nor even the limitations, that are quite as important as the propositions themselves. Hence there may be some danger of misleading the laymen for whom the book is intended. For example, the author lays down many wide propositions as to the powers of agents, but he does not indicate that restrictions upon those powers may be successfully brought home to the assured, — still less that after the policy is issued restrictions contained in the policy itself may curtail the future exercise of the agent's apparent authority. E. W.

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DIGEST OF INSURANCE CASES. For the year ending Oct. 31, 1894. By John A. Finch. Indianapolis: The Rough Notes Company. 1894. pp. xxiv, 220.

This volume, the seventh of a series of year books useful to the insurance lawyer, digests four hundred and forty-nine cases. The fire insurance cases are the most numerous, comprising almost half of the total number. The cases on fraternal-benefit orders appear to exceed in number those on life insurance of the ordinary sort. Next comes accident insurance. Lower in the list is marine insurance, with only sixteen cases. A minor defect in the volume is the neglect to distinguish the reports of the Probate Division from those of the Queen's Bench Division. E. W.

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## THE TEACHING OF ENGLISH LAW AT UNIVERSITIES.<sup>1</sup>

IN so great a country as ours, so wide and so diversified, it is peculiarly well, now and then, to gather together from far and near, and meet on a common footing as Americans. And so we have come now to this beautiful city, a novel and strange place to many of us, to breathe for a day or two this exhilarating atmosphere of a common nationality, the broad and general air that blows not merely here or there in our country, but everywhere; to think the thoughts and interchange the sentiments that concern us as American lawyers. For myself, I have been chiefly moved, in coming here from the far-away sea-coast of Maine, by the desire to say a few words towards urging a very thorough and learned study of our English law, and the maintenance of schools of law which conform in all respects to the highest University standards of work.

We, in America, have carried legal education much farther than it has gone in England. There the systematic teaching of

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<sup>1</sup> An address, read at Detroit, August 27, 1895, as Chairman of the Section on Legal Education of the American Bar Association.

The reader is requested to observe that this paper does not deal with mere method of teaching, or with any differences which may be supposed to be appropriate in under graduate instruction as contrasted with that of postgraduate and professional courses. It is directed to the University teaching of English law, by whatever methods carried on, in whatever departments, and for whatever purpose. The author had chiefly in mind the "law schools," properly so called; that is to say, schools aiming directly at professional education.



law in schools is but faintly developed. Here it is elaborate, widely favored, rapidly extending. Why is this? Not because we originated this method. We transplanted an English root, and nurtured and developed it, while at home it was suffered to languish and die down. It was the great experiment in the University teaching of our law at Oxford, in the third quarter of the eighteenth century, and the publication, a little before the American Revolution, of the results of that experiment, which furnished the stimulus and the exemplar for our own early attempts at systematic legal education. The opportunities and the material here for any thorough work of this sort in the offices of lawyers were slight. "I never dreamed," said Chancellor Kent, in speaking of the state of things in New York, even so late as the period when he was appointed to the bench of the Supreme Court of that State in 1798, "of volumes of reports and written opinions. Such things were not then thought of. . . . There were no reports of State precedents. I first introduced a thorough examination of cases, and written opinions."<sup>1</sup> But wisdom, skill, experience, and an acquaintance with English books were not wanting in the legal profession here; and Blackstone's great achievement awakened the utmost interest and enthusiasm on both sides of the water, — his success in the really Herculean task of redeeming to orderly statement and to an approximately scientific form, the disordered bulk of our common law. "I retired to a country village," Chancellor Kent tells us, in speaking of the breaking up of Yale College by the war, where he was a student in 1779, "and, finding Blackstone's Commentaries, I read the four volumes. . . . The work inspired me at the age of fifteen with awe, and I fondly determined to be a lawyer." As a student in the office of the Attorney-General of New York, in 1781 and later, he says that he read Blackstone "again and again."<sup>2</sup> Blackstone's lectures were begun in 1753, when the author, then only thirty years old, a discouraged barrister of seven years standing, had retired from Westminster and settled down to academic work at Oxford. On the death of Viner he was made, in 1758, the first professor of English law at any English University; and he published his first volume of lectures in 1765. "There is abundant evidence," if we may rely upon the authority of Dr. Hammond, whose language I quote, "of the immediate absorption of nearly twenty-five hundred copies of the commentaries in the

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<sup>1</sup> Green Bag, vii, 157.<sup>2</sup> Ibid. 153.

thirteen colonies before the Declaration of Independence. . . . Upon all questions of private law, at least, this work stood for the law itself throughout the country, and . . . exercised an influence upon the jurisprudence of the new nation which no other work has since enjoyed." <sup>1</sup> This great result, it should be observed, was the work of a young enthusiast in legal education, a scholar and a University man, who had the genius to see that English law was worthy to be taught on a footing with other sciences, and as other systems of law had been taught in the Universities of other countries.

Blackstone's example was immediately followed here, and was soon further developed in the form which he had urged upon the authorities at Oxford, but urged in vain,—that of a separate college or school of law. In 1779, the year after Blackstone had published the eighth and final edition of his lectures, and only a year before his death, a chair of law was founded in Virginia, at William and Mary College, by the efforts of Jefferson, then a visitor of the institution; and in the same year Isaac Royall of Massachusetts, then a resident in London, made his will, giving property to Harvard College for establishing there that professorship of law which still bears his name. In 1790, Wilson gave law lectures at the University of Pennsylvania. The Litchfield Law School, established about 1784, was not a University school; yet if it be true, as is not improbable, that it was the natural outgrowth of an office overcrowded with students, it may well be conjectured that Blackstone's undertaking chiefly shaped and sustained it. At any rate his lectures appear to have been the chief references of the instructors at Litchfield. Hammond, in referring to a collection of *verbatim* notes of lectures at the Litchfield school in 1817, representing, as he conceives, "the exact teaching" of the professors of that time, says "that the references to Blackstone not only outnumber those of any other book, but may be said to outnumber all the rest together." <sup>2</sup>

In England little progress was made for a century. Blackstone's plan for a law College at Oxford was not carried out, and he resigned, disappointed, in 1766. The conservatism of a powerful profession, absorbed in the mere business of its calling, itself untrained in the learned or scientific study of law, and unconscious of the need of such training, did not yield to or much consider the

<sup>1</sup> 1 Hammond's Blackstone, ix.

<sup>2</sup> Ibid x., note.



suggestions of what had already been done at Oxford. The old method of office apprenticeship was not broken up. The profession was extended with Blackstone's Commentaries, as if these had done all that could be done and had made the full and final restatement of the law. The student simply added to his ordinary work the reading of these volumes.

But the more enlightened members of our profession in England have keenly felt the backward state of things there. One of the greatest of them, Sir Richard Bethell, afterwards Lord Chancellor Westbury, on taking his seat as president of the Juridical Society forty years ago, lamented the neglect of legal science in England and the strange indifference of the profession to the pursuit of it. Lawyers, he says,<sup>1</sup> "are members of a profession who, from the beginning to the end of their lives, ought to regard themselves as students of the most exalted branch of knowledge, Moral Philosophy embodied and applied in the laws and institutions of a great people. There is no other class or order in the community," he adds, "on whom so much of human happiness depends, or whose pursuits and studies are so intimately connected with the progress and well-being of mankind." In enumerating the causes of this failure to appreciate the dignity of their calling, he names as one of the chief of them, "the want of a systematic and well-arranged course of legal education. . . . It belongs," he adds, "to the Universities of England and to the Inns of Court to fill the void; but for centuries the duty has remained unperformed." It still remains very imperfectly performed. But England is moving in the direction that Blackstone pointed, and in its own way will yet solve the problem. Admirable work is going forward there now; and how full a sympathy the leaders in it entertain for our own efforts is shown by the coming of Sir Frederick Pollock this summer to take part in the exercises at Harvard, on occasion of the celebration of Dean Langdell's twenty-fifth anniversary. He crossed the ocean for that mere purpose, and returned as soon as it was accomplished.

On this side of the water, while the training of our profession continued for a long time to be the old one of office apprenticeship and reading, the new conception — new as regards English law — of systematic study at the Universities, has had continuous life, and has borne abundant fruit. If it has sometimes languished,

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<sup>1</sup> 1 Jurid. Soc. Pap. 1.

and here and there been intermittent, it has always lived and thriven somewhere ; and at last it has so commended itself that there is no longer much occasion to argue its merits. Few now come openly forward to deny or doubt them.

This, then, is our American distinction, to have accepted and carried for a century into practice the doctrine that English law should be taught systematically at schools and at the Universities. President Rogers, the chairman of this Section last year, told us that there were then seventy-two schools of law in this country, of which sixty-five were associated with Universities. I am informed upon good authority that the number is now not under seventy-five or seventy-six, and that the proportion of University schools is about the same as that just indicated.

It behoves us now to look squarely at the meaning of these facts, and at the responsibilities that they lay upon us. The most accomplished teachers of law in England have seen with admiration and with something like envy the vantage-ground that has been reached here. We must not be wanting to the position in which we find ourselves. Especially we must not be content with a mere lip service, with merely tagging our law schools with the name of a University, while they lack entirely the University spirit and character. What, then, does our undertaking involve, and that conception of the study of our English system of law, which, in Blackstone's phrase, "extends the pomoria of University learning and adopts this new tribe of citizens within these philosophical walls" ? It means this, that our law must be studied and taught as other great sciences are studied and taught at the Universities, as deeply, by like methods, and with as thorough a concentration and life-long devotion of all the powers of a learned and studious faculty. If our law be not a science worthy and requiring to be thus studied and thus taught, then, as a distinguished lawyer has remarked, "A University will best consult its own dignity in declining to teach it." This is the plough to which our ancestors here in America set their hand and to which we have set ours ; and we must see to it that the furrow is handsomely turned.

But who is there, I may be asked, to study law in this way ? Who is to have the time for it and the opportunity ? Let me ask a question in return, and answer it. Who is it that studies the natural or physical sciences, engineering, philology, history, theology, or medical science in this way ? First of all, those who, for



any reason, propose to master these subjects, to make true and exact statements of them, and to carry forward in these regions the limits of human knowledge; and especially the teachers of these things. Second, not in so great a degree, but each as far as he may, the leaders in the practical application of these branches of knowledge to human affairs. Third, in a still less degree, yet in some degree, all practitioners of these subjects, if I may use that phrase, who wish to understand their business and to do it thoroughly well.

Precisely the same thing is true in law as in these or any other of the great parts of human knowledge. In all it is alike beneficial, and alike necessary for the vigorous and fruitful development of the subject, for the best performance of the every-day work of the calling to which they relate, and for the best carrying out of the plain practical duties of each man's place, that somewhere and by some persons these subjects should be investigated with the deepest research and the most searching critical study.

The time has gone by when it was necessary to vindicate the utility of deep and lifelong investigations into the nature of electricity and the mode of its operation, into the nature of light and heat and sound and the laws that govern their action, into the minute niceties of the chemical and physiological laboratory, the speculations and experiments of geology, or the absorbing calculations of the mathematician and the astronomer. Men do not now need to be told what it is that has given them the steam-engine, the telegraph, the telephone, the electric railway and the electric light, the telescope, the improved lighthouse, the lucifer match, antiseptic surgery, the prophylactics against small-pox and diphtheria, aluminum the new metal, and the triumphs of modern engineering. These things are mainly the outcome of what seemed to a majority of mankind useless and unpractical study and experiment.

But as regards our law, those who press the importance of thorough and scientific study are not yet exempt from the duty of pointing out the use of it and its necessity. To say nothing of the widespread scepticism among a certain class of practical men, in and out of our profession, as to the advantages of anything of the sort, there is also, among many of those who nominally admit it and even advocate it, a remarkable failure to appreciate what this admission means. It is the simple truth that you cannot have thorough and first-rate training in law, any more than in

physical science, unless you have a body of learned teachers ; and you cannot have a learned faculty of law unless, like other faculties, they give their lives to their work. The main secret of teaching law, as of all teaching, is what Socrates declared to be the secret of eloquence, understanding your subject ; and that requires, as regards any one of the great heads of our law, in the present stage of our science, an enormous and absorbing amount of labor.

Consider how vast the material of our law is, and what the subject-matter is which is to be explored, studied, understood, classified, and taught in our schools of law. It lies chiefly in an immense mass of judicial decisions. These, during several centuries, have spelled out in particular instances, and applied to a vast and perpetually shifting variety of situations, certain inherited principles, formulas, and customs, and certain rules and maxims of good sense and of an ever-developing sense of justice. It lies partly, also, in a quantity of legislation.

What does it mean to ascertain and to master, upon any particular topic, the common law ? It means to ascertain and master, in that particular part of it, the true outcome of this body of material. In an old subject, like the law of real property, such an inquiry goes far back. In a new one, like constitutional law, not so far ; but still, even in that we must search for more than a century, and if we would have a just understanding of some fundamental matters, it means much remoter and collateral investigation. As regards a great part of our law it is not comprehensible, in the sense in which a legal scholar must comprehend his subject, unless something be known, nay, much, of the great volume of English decisions that run back six hundred years to the days of Edward the First, when English legal reporting begins. That is the period which is fixed, in the two noble volumes of "The History of the English Law" just published by the English professors, Sir Frederick Pollock of Oxford and Mr. Maitland of Cambridge, as the end of their labors ; viz., the time when legal reporting begins. In giving the reasons for dealing with this as a separate period, they say "so continuous has been our English legal life during the last six centuries, that the law of the later Middle Ages has never been forgotten among us. It has never passed utterly outside the cognisance of our courts and our practising lawyers." Such is the long tradition that finds expression in the law of this very day, and of this place in which we sit. The volumes just mentioned, ending thus six centuries ago, themselves throw light on much



which concerns our own daily practice in the courts; and they indicate the value and importance of much remoter investigation. You remember, perhaps, that the judicial records of England carry us back to the reign of Richard the First in 1194, seven centuries ago, and that there are scattered memorials of earlier judicial proceedings for another century, gathered for the first time by one of the most learned of our brethren in this association, Prof. Melville M. Bigelow.

Much of this vast mass of matter is unprinted, and much is in a foreign tongue. The old records are in Latin. As to the Reports, for the first two hundred and fifty years after reporting begins, it is all in the Anglo-French of the Year-Books, and mostly in an ill-edited and often inaccurate form. To all these sources of difficulty must be added the generally brief and often very uninformative shape of the report itself. A few of the earlier Year-Books have been edited in thorough and scholarly fashion, accompanied by a translation and illustrations from the manuscript records. But most of them are in a condition which makes research very difficult. The learned historians just quoted have said that "the first and indispensable preliminary to a better legal history than we have of the later Middle Ages is a new, a complete, a tolerable edition of the Year-Books. They should be our glory, for no other country has anything like them; they are our disgrace, for no other country would have so neglected them." The glory and disgrace are ours also, for English law is ours. Efforts on both sides of the water to accomplish this result have as yet failed; but they should succeed, and they will succeed. I wish that my voice might reach some one that would help in securing that important result. It would bring down the blessing of legal scholars now and hereafter. After the Year-Books, come three centuries and a half of reported cases in England; and one of these centuries, more or less, includes the multitudinous reports of our own country and of the English colonies, which continue to pour in upon us daily in so copious and ever-increasing a flood.

Now, will it be said, perhaps, that in bringing forward for study all this mass of material, past, present, and daily increasing at so vast a rate, I am recommending an impossibility and an absurdity? No, I am not; I speak as one who has seen it tried. It is not only practicable, but a necessary preliminary for first-rate work. One or two things must be observed here. Of course no one man can thus explore all our law. But some single thing or several con-

nected things he may ; and every man who proposes really to understand any topic, to put himself in a position to explain it to others, or to restate it with exactness, must search out that one topic through all its development. Such an investigation calls for much time, patience, and labor, but it brings an abundant harvest in the illumination of every corner of the subject. Another thing is to be noticed. Not all our law runs back through all this period. This great living trunk of the common law sends out shoots all along its length. Some subjects, like the law of real property, crimes, pleading, and the jury go very far back ; others, like the learning of Perpetuities or the Statute of Frauds, not so very far ; and others still, like our American Constitutional Law, the learning of the Factors' Acts, of injuries to fellow-servants and other parts of the law of torts, are modern, and perhaps very recent. But be the subject old or new, or much or little, every man in his own field of study must explore this mass of material, — viz., all the decided cases relating to it, — if he would thoroughly understand his subject.

Before I pass on, let me say, as if in a parenthesis, a word or two more about the Year-Books. These great repositories of our mediæval law have been the subject of many cheap and foolish observations, as to their mustiness and mouldiness ; but never, so far as I know, from persons who had any considerable acquaintance with them. It has dwarfed and hurt our law that research has usually stopped short about three centuries back ; as to what went before, it has been the fashion to accept Coke as the epitome, or to take the summaries in the Abridgments. Back of Coke, these ill-printed, unedited, untranslated folios, the Year-Books, have stood like a wall, repelling for most men any further search. But not all scholars have been deterred ; and those who have gone through these volumes have found a rich reward. Amidst their quaint and antiquated learning is found the key to many a modern anomaly ; and the reader observes with delight the vigorous growth of the law from age to age by just the same processes which work in it to-day in our latest reports. There, as well as here, together with much that is petty and narrow, one remarks not only well-digested learning and thoughtful conservatism giving its reasons, but also growth, the vigor of original thought, liberal ideas, and the breaking out of what we call the modern spirit.

Coming back to the task of the student of our law, it spreads far beyond what I have yet set forth ; it has been wisely said that



if a man would know any one thing, he must know more than one. And so our system of law must be compared with others; its characteristics only come out when this is done. As to the examination of mediæval and modern continental law, we have hardly made a beginning. When we trace our law far back, the only possible comparison with anything long-lived and continuous is with the Roman law. If any one would remind himself of the flood of light that may come from such comparisons, let him recall the brilliant work of Pollock's predecessor at Oxford, Sir Henry Maine, in his great book on *Ancient Law*. That is the best use of the Roman law for us, as a mirror to reflect light upon our own, a tool to unlock its secrets. And so the recent learned historians of our law have used it. In writing of the English system of writs and forms of action, for instance, they put meaning into the whole matter in pointing out that all this, beginning in the middle of the twelfth century, finds a parallel in Rome "at a remote stage of Roman history. We call it distinctively English; but it is also in a certain sense very Roman. While the other nations of Western Europe were beginning to adopt as their own the ultimate results of Roman legal history, England was unconsciously reproducing that history."

Of the value of such comparative studies, and their immense power to lift the different subjects of our law into a clear and animating light, no competent person who has once profited by them can ever doubt. But, again, observe what this means. It means adding to the wide and difficult researches already marked out another great field of investigation. If it be said that our teacher of English law may profit by the labor of others, and has only to read his "*Ancient Law*," and his "*History of English Law*," I reply that the field is still largely unexplored; and, furthermore, that, for the scholar, such books are helps and guides for his own research, and not substitutes for it.

So much for this head of what I have to say. Over these vast fields the competent teacher of law must carefully and minutely explore the history and development of his subject. I set down first this thorough historical and chronological exploration, because in this lie hidden the explanation of what is most troublesome in our law, and because in this is found the stimulus that most feeds the enthusiasm and enriches the thought and the instruction of the teacher. The dullest topics kindle when touched with the light of historical research, and the most recondite and technical

fall into the order of common experience and rational thought. Sir Henry Maine's book, like that of Darwin in a different sphere, at about the same time, created an epoch. Such books have made it impossible for the law student ever again to be content with the sort of food that fed his fathers, with that "disorderly mass of crabbed pedantry," for instance, as our recent historians of the law have justly called it, "that Coke poured forth as institutes of English law." Never again can he receive the spirit of bondage that once bent itself to teach or to study the law through such a medium.<sup>1</sup>

And now comes another labor for the legal scholar. After such researches as I have indicated, in any part of the law, the outcome of it is certain to be the necessity of restating the subject in hand. When things have once been thus explored and traced, many a hitherto unobserved relationship of ideas come to light, many an old one vanishes, many a new explanation of current doctrines is suggested and many a disentangling of confused topics, many a clearing away of ambiguities, of false theories, of outworn and unintelligible phraseology. There is no such dissolver and rationalizer of technicality as this. A new order arises. And so when the work of exploration has been gone over, there comes the time for producing and publishing the results of it. Admirable work of this sort, and a good bulk of it, has already been done, — work that is certain to be of inestimable value to our profession. In some instances it is but little known as yet; in others, it appears already in our handbooks on both sides of the ocean, and in the decisions of the courts.

The publishing of these results by competent persons is one of the chief benefits which we may expect from the thorough and scientific teaching of law at the universities. In no respect can more be done to aid our courts in their great and difficult task. There are many useful handbooks for office use and reference, and some excellent ones. But the number of really good English law treatises — good, I mean, when measured by a high standard — is very few indeed. They improve; and yet, to a great extent to-day, the writers and publishers of lawbooks are abusing the confidence of the profession, and practising upon its necessities.

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<sup>1</sup> In saying of Coke what is just quoted, it will be observed that he is dealt with as a writer of institutes of the law. Of course that great name stands for much else in our law and our constitutional history, — for much which is great and good and never to be forgotten.



If I am asked to specify more particularly the sort of thing that may come out of the researches to which I have referred, and that has already been produced from the Universities, I am tempted to refer first to a foreign book about one of our English topics,—a book which is a little remote from our every-day questions, but full of value in any deep consideration of the subject,—the admirable *History of the Jury* by Brunner, professor of law at Berlin, published in 1872. That is a book of the first class, superseding all others upon the subject; and yet, to the disgrace of the English-speaking race, it has not yet been translated into our language. English and American scholars have supplemented the work of Brunner; and the material for a true understanding of the history and uses of the jury system, and for a wise judgment as to continuing or modifying the use of it, were never anything like so good as now.

Then there is that masterly *History of the English Law* by two English law professors of our own time, of which I have already spoken. In mentioning this book, it is only just to Professor Maitland, one of the finest scholars of our time, that I should quote the remark of his distinguished associate, where he says in the preface that, “although the book was planned in common and has been revised by both of us, by far the greater share of the execution belongs to Mr. Maitland, both as to the actual writing and as to the detailed research which was constantly required.” Of other English work to be credited to the Universities, I have already mentioned the great performances of Blackstone and Maine, and I need only allude to the important works, well known among us, of Dicey, Holland, Markby, and Pollock. Less well known, but masterly in its way is Maitland’s editing of that selection from the judicial records of the thirteenth century which is known as *Bracton’s Note Book*, and of other unpublished material brought out by the Selden Society.

As to this country, I will not mention names. I need not refer to the famous and familiar books from our University schools of law, by our leaders, living and dead. I will simply say this, that in recent times the researches and contributions of our own teachers of the law, at the Universities in various parts of the country,—and I include now not less than seven of these institutions,—have produced most important material, which is already finding its way into the current handbooks of the profession, here and in England,—material which not only illuminates the field of the

student's work, but lightens the daily drudgery of the bench and bar. The true nature of equitable rights and remedies ; the doctrine of equitable defences ; the history and analysis of the law of Contract, Torts, Trusts, and Evidence ; the nature and true theory of the negotiability of obligations ; the nature of the Common Law itself ; the whole doctrine of Quasi-Contract ; the doctrine of Perpetuities, — these things make only a part of this material. As I said, I do not speak of work done at any one institution or in any one part of the country merely.

But now suppose some one says, What is the use of carrying on our backs all this enormous load of the Common Law ? Let us codify, and be rid of all this by enacting what we need, and repealing the rest.

Well, I am not going to discuss codification. There is not time for that. And the word is an ambiguous one ; some good things and some bad ones are called by this name. I will only say that as yet we do not well understand our law ; it is our first duty to understand it. The effort to codify it, or systematically to restate it for purposes of legislation, — for any purpose other than a merely academic one, — should come later, if it come at all. To codify what is only half understood is to perpetuate a mass of errors and shallow ambiguities ; it is to begin at the wrong end. Let us, first of all, thoroughly know our ground. I can say this with confidence, that as regards one or two departments of law with which I have a considerable acquaintance, I have never seen any attempt at codification, here or abroad, which was not plainly marked by grave and disqualifying defects. Good-will, strong general capacity, courage, sense, practical gifts, are indeed not wanting in some of these attempts ; but a competent knowledge of the subject is wanting.

My honored friend, Judge Dillon, in his excellent address last year, said a word or two in connection with this subject which should be supplemented, I think, by a word or two more. In speaking of law reforms, he remarked that "no mere doctrinaire or closet student of our technical system of law is capable of wise and well-directed efforts to amend it. This must be the work of practical lawyers." If the expression "mere doctrinaire or closet student" refers to any class of pedants and incompetent persons who do not appreciate the nature of what they are studying, I should not wish to qualify that portion of the remark just quoted which reaches them. But if it may be supposed to allude to the class of legal



scholars as such, to the experts in legal and juristic learning, this remark, at the best, is but half a truth. The practical work of carrying through any considerable measure of reform, of getting it enacted, is indeed peculiarly a task for the practical lawyer. His judgment also is important in the wise shaping of such a measure ; as his authority and influence will be quite essential in gaining for it the confidence of legislators and their constituents. But no "wise and well-directed efforts" of this character can dispense with the approval and co-operation of the legal scholar. I am speaking, of course, of competent persons, in both the classes referred to, and not of pedants or ignoramuses ; and am assuming on the part of the systematic student of law, as on the part of the judge or practitioner, a suitable outfit of sense, discretion, preliminary professional education, and capacity to understand the eminently practical nature of the considerations which govern the discussion of legal questions. Perhaps I may be permitted to speak on this subject with the more confidence, as having been a busy practitioner at the bar of a large city for eighteen years, before beginning an experience as a professor at the Harvard Law School which has now continued for twenty-one years.

Professor Dicey has remarked, I believe, of the jurist's work in England, of the sort of work which he himself has so admirably done, that it "stinks in the nostrils" of the average English practitioner ; and Sir Frederick Pollock, in his inaugural lecture, twelve years ago, as Corpus Professor of Jurisprudence at Oxford, in speaking of his associates there, Dicey and Bryce and Anson, says, with dignity, that they are "fellow-workers in a pursuit still followed in this land by few, scorned or depreciated by many, the scientific and systematic study of law."<sup>1</sup> That state of things is slowly disappearing in England, as well as here, with the gradual improvement in the legal education of the bar. One of the best and most important results of this improvement will be a more cordial respect and a closer co-operation between the different parts of our profession, the scholars and the men of affairs. Nothing is more important to the dignity and power of our common calling.

Let me now finally come down to this question : If what I have been saying as to the scope of the work of the University teaching of law be true, what does it mean as regards the outfit and the carrying on of these schools ?

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<sup>1</sup> Oxford Lectures, 38

It means several things. (1) Limiting the task of the instructors. Instead of allotting to a man the whole of the common law, or half a dozen disconnected subjects at once, it means giving him a far more limited field, — one single subject, perhaps ; two or three at most ; if more than one, then, if possible, nearly related subjects ; to the end that his work of instruction may be thoroughly done, and that as the final outcome of his studies some solid, public, and permanent contribution may be made to the main topic which he has in hand.

It means (2) that instructors shall give, substantially, their whole time and strength to the work. In mastering their material and qualifying themselves for their task, they have in hand, say for the next two generations, much formidable labor in exploring the history and chronological development of our law in all its parts. On this, as I have indicated, a brave beginning has been made, and it is already yielding the handsomest fruits. They have also, of course, all the detail of their difficult main work of teaching ; and this, when the work is fitly performed, calls for an amount of time, thought and attention bestowed on the personal side of a man's relation to his students which instructors now can seldom give.

It means (3) that the pupils also shall give all their time to the work of legal study while they are about it. There is more than enough in the careful preliminary study of the law to occupy three full years of an able and thoroughly trained young man. It is, I think, a delusion to suppose that this precious seed-time can profitably be employed, in any degree, in attendance upon the courts or in apprenticeship in an office. I do not speak, of course, of an occasional excursion into these regions when some great case is up or some great lawyer is to be heard, or of the occasional continuous use of time in such ways during these long vacations which are generally allowed nowadays. Nor do I mean to deny that attendance upon courts to witness the trial of a case now and then will be a good school exercise. I speak only of systematic attempts to combine attendance at law schools with office-work and with watching the courts. The time for all that comes later, or perhaps in some cases, before.

It means (4) that generous libraries shall be collected at the Universities suited to all the ordinary necessities of careful legal research ; and it also means gathering at some one point in the country, or at several points, the best law library that money can possibly buy.



And (5), in saying that proper University teaching of law means all this, I am saying in the same breath that it means another thing; viz., the endowment of such schools. The highest education always means endowment; the schools which give it are all charity schools. What student at Oxford or Cambridge, at Harvard, Yale, Columbia, Ann Arbor, or Chicago pays his way? We must recognize, in providing for teaching our great science of the law, that it is no exception to the rule. Our law schools must be endowed as our colleges are endowed. If they are not, then the managers must needs consult the market, and consider what will pay; they will bid for numbers of students instead of excellence of work. They will act in the spirit of a distinguished, but ill-advised trustee of one of the seats of learning in my own State of Massachusetts, when he remarked, "We should run this institution as we would run a mill; if any part of it does not pay, we should lop it off." They will come to forget that it is the peculiar calling of a University to maintain schools that do not pay, or, to speak more exactly, to maintain them whether they pay or not; that the first requisite for the conduct of a University is faith in the highest standards of work; and that if maintaining these standards does not pay, this circumstance is nothing to the purpose, — maintained they must be, none the less. It has been justly said that it is not the office of a University to make money, or even to support itself, but wisely to use money.

If, then, we of the American Bar would have our law hold its fit place among the great objects of human study and contemplation; if we would breed lawyers well grounded in what is fundamental in its learning and its principles, competent to handle it with the courage that springs from assured knowledge, and inspired with love of it, — men who are not, indeed, in any degree insensible to worldly ambitions and emoluments, who are, rather, filled with a wholesome and eager desire for them, but whose minds have been lifted and steadied and their ambitions purged and animated by a knowledge of the great past of their profession, of the secular processes and struggles by which it has been, is now, and ever will be struggling towards justice and emerging into a better conformity to the actual wants of mankind, — then we must deal with it at our Universities and our higher schools as all other sciences and all other great and difficult subjects are dealt with, as thoroughly, and with no less an expenditure of time and money and effort.

*James Bradley Thayer.*

## GENERAL AVERAGE.

“QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS.”

THE occasion for this article is a recent decision of the Supreme Court,<sup>1</sup> that damage caused by water poured into the hold of a vessel in port to extinguish a fire, and by scuttling the ship for the same purpose, when done by the fire-engine companies of the municipality, is not a subject for a general average adjustment, provided they came without the master's initiative, and were not within his control, and a similar decision made in Massachusetts in 1883.<sup>2</sup>

These decisions I purpose to review.

The decisions upon the precise point are few, and entirely irreconcilable. In the Massachusetts case, Mr. Justice Field states with great clearness the view taken by the court. Mr. Justice Gray, giving the opinion of the majority court in *Ralli v. Troup*, approves this decision, and quotes largely from the opinion of Field, J. His own opinion consists of a very learned and thorough exposition of the decisions, which will always be valuable, though, upon the particular point in judgment, I cannot find in the decisions support for his conclusion.

On the other hand, the decision in the District Court by Judge Addison Brown,<sup>3</sup> and the minority opinion in the Supreme Court, given by Mr. Justice Brown for himself and Mr. Justice Harlan, should be referred to for able arguments on the other side. Other cases which I shall mention support the minority opinion.

In this divergence of opinion, my comments must be regarded as argumentative and not dogmatic; and in the paucity of decisions, the underlying principle of general average must be considered.

The general summing up at the end of the majority opinion in *Ralli v. Troup* is too long for quotation in full. Stated briefly, the first proposition is, that to constitute a general average loss there must be a voluntary sacrifice of part of a maritime adventure, for

<sup>1</sup> *Ralli v. Troup*, 157 U. S. 386.

<sup>2</sup> *Wamsutta Mills v. Old Colony Steamboat Company*, 137 Mass. 471.

<sup>3</sup> 37 Fed. Rep. 888.



the purpose and with the effect of saving the other parts from a peril impending over the whole.

Thus far I agree, and the case in judgment is within the definition, which contains, in my opinion, not only the truth, but the whole truth.

The summary then goes on to limit the rule. It says that the sacrifice must be with the sole object of saving the other parts of the adventure; that it must be made by the will and act of its owner, or of the master of the ship or other person intrusted with control of the common adventure; that port authorities being strangers to the adventure, and their right and duty being derived from the municipal law, and not from the law of the sea, and since in their action they are not subject to be controlled by the owners of the adventure, their acts are not general average acts.

One sentence I quote in full. Speaking of the port authorities, the opinion says: "Their sole office and paramount duty, and it must be presumed their motive and purpose in destroying ship or cargo, in order to put out a fire, are not to save the rest of a single maritime adventure, or to benefit private individuals engaged in that adventure; but to preserve the shipping and property in the port for the benefit of the public." This last statement I will consider now, as I shall not refer to it again.

The learned judge appears to be likening the putting out of a fire on a ship to the destruction of a house which is not on fire to stop the spread of a conflagration, which by the common law is not to be paid for; though statutes in some States have, I believe, remedied this oversight. That was not at all the case before the court. The fact was that the fire companies poured water into a ship on fire, and afterwards scuttled her. The intent of any one, company or individual, in trying to put out a fire is to put out that fire; and it is as much the duty of a municipal fire company to put out a fire in a house or ship, when other property is not endangered as when it is. I shall assume, without further argument, that the intent of the fire companies was to put out this fire, and therefore necessarily their intent, if they had any besides an intent to do their duty, was to benefit whomsoever they might benefit thereby. The proposition that the sole intent must be to benefit the common adventure, I shall refer to presently.

My position is that the doctrine is stated in the first sentence above quoted, that there should be a voluntary and successful sacrifice of part of a maritime adventure with intent to save the

other parts,<sup>1</sup> and that the numerous subsequent limitations are not sustainable.

The law of general average was originally called by the Greeks and Romans the law of jettison, from the simplest instance of its exercise, — that of throwing goods overboard to lighten the ship; and the rule was laid down, that what is given for the benefit of all should be made good by the contribution of all.

This law as now administered does not depend upon evidence of the extent of any custom, nor upon any implied contract between the several persons interested in the adventure,<sup>2</sup> though a fictitious contract has been imagined by some English judges, in order, apparently, to give the courts of common law jurisdiction after they had crippled the Admiralty, where the question properly belongs. Their position was that the Admiralty could not deal with contract, as such, which, indeed, was formerly the law of England. "It is, indeed, a sight," says Maclachlan, "to witness the successors of the famous Twelve [meaning the judges who prohibited suits in the Admiralty] contending for the customs of the sea as the basis of general average, and at the same time the successor of the unfortunate judge of the Admiralty Court refusing jurisdiction over general average, because it rested on no such basis."<sup>3</sup>

The point is not of much consequence, because the imagined contract is confessedly a fiction, and those who use that expression merely mean that persons may be supposed to contract to do what the law requires of them.

The law of general average is an equitable rule analogous to that of contribution between persons subject to a common burden, but bound by no contract *inter se*, and is imposed by law upon the parties.

In the leading case, concerning contribution between co-sureties,<sup>4</sup> Lord Chief Baron Eyre, delivering the opinion of the court, said, "As in the case of average of cargo in a court of law, *qui sentit commodum sentire debet et onus*. . . . In questions of average there is no contract or privity in ordinary cases; but it is the result of general justice, from the equality of burden and benefit."

In another report of the case<sup>5</sup> the language given is: "In the

<sup>1</sup> Voluntarily means purposely.

<sup>2</sup> See *Crooks v. Allan*, 5 Q. B. D. 38; *Burton v. English*, 12 Q. B. D. 218, 220; *Page v. Libby*, 14 Allen, 261, 267; *Marwick v. Rogers*, 163 Mass. 261, 267.

<sup>3</sup> *Law of Merchant Shipping*, 4th ed. p. 690, note.

<sup>4</sup> *Dering v. Earl Winchelsea*, 1 Cox, 318, 322.

<sup>5</sup> 2 B. & P. 270, 274.



case of average, there is no contract express or implied in an ordinary sense. This shows that contribution is founded on equality, and established by the law of all nations."

General average is applied in all maritime countries to many cases besides jettison; for instance, to the sacrifice of mast or rigging, extraordinary expenses in a port of necessity, and many others.

When water was poured into the hold of a vessel to put out a fire, or the ship was scuttled for that purpose, adjusters in England, until the year 1873, refused to consider damage to goods by water, or to the vessel by cutting holes in the deck or hull, as a subject for contribution. It is now, however, held in all European countries, and in the United States and England, to come within the principle. This was established by the courts of the United States in 1855 and 1856, and in England in 1873.

Among extraordinary expenses must be reckoned money paid for salvage. Such payment, whether voluntary or by order of the court, is a general average charge, and is properly so declared on in an action.<sup>1</sup> This does not arise from any contract between the parties to the adventure, nor because the master is the agent of all parties, nor is the expense always voluntarily incurred.

In a case of derelict where contribution in general average was claimed, one defence was that the expense was not incurred voluntarily, meaning that no one connected with the adventure had ordered it, but judgment was given for the claim.<sup>2</sup> So of military salvage decreed and paid for a recapture by the navy.<sup>3</sup> No one can doubt that naval officers are as much servants of the government as fire companies are servants of a municipality.

In one case, the House of Lords held that money paid by the master under a contract, which he had made with a salvor, was not binding on the owner of the cargo as a contract, but that a reasonable share of the salvage money might be recovered by the shipowner from the cargo-owner, and that the determination of the amount should have been left to the jury.<sup>4</sup>

These decisions show that a general average sacrifice need not

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<sup>1</sup> *Briggs v. Traders' Association*, 13 Q. B. 167; *Akerblom v. Price*, 7 Q. B. D. 129; *Ocean S. S. Co. v. Anderson*, 13 Q. B. D. 651.

<sup>2</sup> *Briggs v. Traders' Association*, 13 Q. B. 167.

<sup>3</sup> *The Racehorse*, 3 Rob. 101.

<sup>4</sup> *Anderson v. Ocean S. S. Co.*, 10 App. Cas. 107.

be ordered by any one connected with the adventure; and that if so ordered, it is not necessarily binding on an owner of cargo.

Under this doctrine of equity and equality, would any one imagine that my right of contribution for my goods successfully jettisoned for the general safety, should depend upon whether the order for the jettison came from the commander of the ship? The alternative would be that I should recover the whole value of my goods from the passenger effecting the jettison, or from the owners of the ship, if it was done by the crew; but *Mouse's* case, which I shall refer to presently, closes this alternative. I shall try to prove that the authorities, so far as any are at all analogous to the case under consideration, do not sanction such a narrow doctrine as is now announced.

It is true that the master is, by necessity, in times of peril, the agent of all persons interested; his power, responsibility, and duty as such agent are much enlarged upon in many cases; but they were cases where he had ordered the sacrifice, and where the question was whether the loss should fall upon him and his owners, or be brought into contribution. In almost all cases, the master does order the act.

In ordering a jettison, however, the master does not act as agent of the owner of the goods cast overboard, but as commander of the ship.

In the *ROLLS OF OLERON* and the *LAWS OF WISBY*, it is adjudged, that if merchants are on board the ship, the master should consult them before throwing over their goods; but they further say that if the merchants refuse their consent, he may none the less make the jettison lawfully, if he and a certain proportion of his crew will on reaching land make oath that it was necessary for the common safety, which is the quaint mediæval way of saying if the necessity existed.<sup>1</sup>

This example teaches that the master does not act as agent of the owner of the goods jettisoned (for the principal was present and refused his consent), but as a man in authority, like the fire companies, and that a voluntary sacrifice of merchants' goods does not mean a willing one on their part.

An early English case of jettison is *Mouse's* case.<sup>2</sup> There a barge, used as a ferry-boat between Gravesend and London, met

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<sup>1</sup> *Rolls of Oleron*, Pardessus, vol. i. p. 328; *Laws of Wisby*, Pardessus, vol. i. p. 490; *Black Book of the Admiralty*, vol. iv. p. 276.

<sup>2</sup> 12 Rep. 63.



with a storm, and goods were ejected, "some by one passenger, and some by another," and the owner of certain goods so jettisoned brought an action against the passenger who threw them over; and the court held that if the jettison was necessary for the safety of the passengers, it was lawful; and the jury having found the necessity, the defendant had judgment. The master is not mentioned in connection with the jettison. Mr. Carver's comment on this case is: "In *Mouse's* case, a jettison by a passenger for the general safety was held to be lawful; and though nothing was said there about general average contribution, there can be little doubt that if the jettison for the general safety has been lawful, the rule of contribution applies, however it was made."<sup>1</sup> Professor Parsons makes a similar comment.<sup>2</sup> These remarks of Mr. Carver follow this statement in the same paragraph: "The sacrifice ought, generally speaking, to be made under the directions or with the authority of the master or other person in command of the ship. But that does not appear to be an essential; the real questions are, Was a sacrifice necessary for the general safety? and Were the measures taken reasonably prudent in view of that necessity? It is conceivable that a sacrifice might fulfil these conditions, although made contrary to the will of the master." In this he adduces and approves the opinion of Benecke.<sup>3</sup> In a note he says: "But cf. *Macl.*, p. 664; *Phillips Ins.*, § 1280; *Jacobsen, Sea Laws*, bk. iv., ch. 2, p. 345; *Authority of Crew, The Nimrod, Ware*, 14."

I find nothing in the latest edition of *Maclaughlan*, nor in *Jacobson*, opposed to *Carver* and *Benecke*. *Phillips*, § 1280, simply makes a short quotation from *Judge Ware's* decision in *The Nimrod*. In that case, the question was whether one of the crew, who had jettisoned certain goods while the master was below, and whose act the master promptly disapproved, had thereby forfeited his wages; and the decision was that he had not. The learned judge says, in substance, that it is for the master to give the orders for the sacrifice, and not for the crew to act without his orders. "What they might be justified in doing in extreme cases, such as were put at the argument, it is unnecessary to decide until those cases occur."

It will be noticed that this was a question of the proper conduct of a seaman, and not of general average. The decision was that

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<sup>1</sup> *Carriage by Sea*, 374.

<sup>3</sup> *On Insurance*, p. 172.

<sup>2</sup> *Shipping and Admiralty*, 339.

the sacrifice was not wanton, and therefore there should be no forfeiture of wages. In other words, there was a reasonable ground for the jettison; and if so, it was, in my opinion, a case for contribution, if that had been the question before the court.

There was a decision in the District Court for Massachusetts that a necessary jettison of certain rolls of leather by seamen without the orders of the master, and disapproved by him, gave occasion for a general average adjustment.<sup>1</sup> The able and learned counsel who had brought his libel against the owners of the ship, for the whole damage, was not satisfied with the decision. I would suggest that he did not give sufficient credit to the fact of necessity, which was evidence that without the jettison his clients would have lost their goods entirely, instead of only their proportionate share. A French commentator puts jettison by the crew, without the master's order, as general average, if the necessity existed; and he thinks that the German Code, which requires, as he understands it, the master's order, to be too restrictive (Valroger, *Droit Maritime*, vol. v., p. 35, No. 2006). It is pertinent to observe that Mr. Justice Brown, granting that the master is to give the order, considers that any person in lawful command is the equivalent of the master. I agree to this; but do not admit the major premise. The German Code, art. 702, says: "All damage done to ship or cargo or both by the master or by his orders, with intent to save both from a common danger, as also the consequential damages resulting therefrom, and the expenses incurred for the same purpose, are general average." In no other code, or elsewhere, that I know of, is the master mentioned in the definition, though it is assumed that he usually orders the sacrifice.

Lord Tenterden cites *Mouse's case* in his description of "general average" as one of a lawful jettison, from which it may be fairly inferred, I think, that he would have agreed with Carver and Parsons that it was a case for contribution.

In an English case tried in 1811,<sup>2</sup> it was proved that an English vessel had been captured by French privateers, who took out the captain and crew, except the mate and two of her men, and put on board her a French prize-master and part of the privateer's crew, and shaped their course for Marseilles; and a storm arising,

<sup>1</sup> The *Adriatic*, *ex relatione* J. Lathrop, now Lathrop, J., of the Supreme Court of Massachusetts, who is the counsel referred to. I made the decision, but had forgotten it.

<sup>2</sup> *Price v. Noble*, 4 Taunt. 123.



they threw overboard, for the necessary preservation of the ship, and with the assistance and approbation of the mate, whom they called to their aid in navigating the vessel, the guns, two anchors, two cables, and other stores from the middle deck. On the following day, the ship was retaken by the mate, with the assistance of some Italians in the Frenchman's service, and was carried into Gibraltar.

The owners of the ship succeeded in an action for contribution against the owners of the cargo.

This case is referred to in *Ralli v. Troup* as if the fact that the mate ordered the jettison supported the contention that the master, or in his absence the mate, must be the actor.

It is plain, however, that the mate was not acting as the agent of the owners of the ship and of the shippers, but as the prisoner and servant of the captors, who themselves conferred the benefit.

The defendant's counsel in that case argued that general average arose from the act of the master and mariners, which he truly remarked was not the case in this instance. The court overruled the objection.

It is clear from an examination of the opinion of Mansfield, C. J., that the action of the mate is referred to only as proving the necessity of the jettison. It was so understood by Lord Tenterden. In the fifth edition of *Abbott on Shipping*, the last edition for which the author was responsible, the case is stated thus (the italics in text and note are by the author): "And it has been decided in an English court in the case of a ship captured and afterwards recaptured that the shippers of goods were liable to contribution for stores *necessarily* thrown overboard during a storm while she was in the hands of an enemy." The note to this case is as follows: "*Price v. Noble*, 4 Taunt. 123. In this case the *necessity of the jettison was proved* by the testimony of the mate, who had not been taken out of the ship, and who had effected the recapture."<sup>1</sup>

In some editions later than the fifth, this note is omitted, and the words "with the advice of the mate" are inserted in the text in speaking of the jettison. I suppose that the change was made by Shee, J. These changes seem to show that some editors may

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<sup>1</sup> In the preface to the thirteenth edition, the learned editors say that they have endeavored "to reinstate (except so far as it is obviously obsolete) the fifth edition, which was the last for which Lord Tenterden was responsible." This passage they have reinstated. See 5th ed. p. 348; 13th ed. p. 642.

have attributed more importance to the mate's advice than did the author; but the decision was rightly understood by Lord Tenterden. The true text and note are restored in the thirteenth edition.

In *Parsons* the note is this, "The owners of cargo are liable to contribution for ship's stores necessarily thrown overboard after a vessel is captured and when she is in the hands of the captors. *Price v. Noble*, 4 Taunt. 123."<sup>1</sup>

As I have already said, the case of injury by water used to put out a fire, or to the ship by cutting holes in her deck or hull for that purpose, was not brought before the courts until 1855. In that year, *Nimick v. Holmes*<sup>2</sup> was decided. In that case, Lowrie, J., delivering the opinion, says, "It makes no difference how the water is applied, by the aid of *fire-engines* on the land, or in the form of steam, or by scuttling the vessel. *All three modes were tried in this case before the success was complete.*" I have italicised the statement that fire-engines were used, because this fact is overlooked in both the cases I am reviewing.

In the first English case<sup>3</sup> (1873) which changed the practice of adjusters in England,<sup>4</sup> this passage is quoted with approval by Quain, J., delivering the considered opinion of the court, who could find no English case upon the subject. It is true that the opinion in that case was not a decision, because the parties had agreed that average, if any, should be adjusted according to British custom, and it appeared that British adjusters treated such a loss as a particular average.

In a later case<sup>5</sup> the stipulation was: "All questions of general average to be settled according to the custom of London Underwriters at Lloyd's," and a jury found that there was no custom of underwriters to treat such a loss as a particular average, and a judgment for general average was recovered.

*Nimick v. Holmes* is cited in several other English cases, with approval, though without any quotation from the opinion.<sup>6</sup>

The rule being established and fully recognized that in general the damage by water is to be compensated for, I shall now refer

<sup>1</sup> *Parsons on Shipping and Admiralty*, 352, note.

<sup>2</sup> 25 Penn St. 366, 373.

<sup>3</sup> *Stewart v. W. I. and Pac. S. S. Co.*, L. R. 8 Q. B. 88, 93.

<sup>4</sup> 2 Asp. Mar. Cases, N. S. 32, note a.

<sup>5</sup> *Achard v. Ring*, 2 Asp. Mar. Cases, N. S. 422.

<sup>6</sup> See *Pirie v. Middle Dock Co.*, 4 Asp. Mar. Cases, N. S. 388, 392; *White Cross Wire Co. v. Savill*, 2 Q. B. D. 653, 660.



only to those cases in which fire companies have done part of the work of putting out the fire.

The next case of the use of fire-engines after *Nimick v. Holmes*, is *Nelson v. Belmont*,<sup>1</sup> tried in 1856. It was taken for granted that the case was one of general average, though the fire companies assisted; the dispute was whether the defendant's specie was, under the peculiar circumstances, liable to contribute.

The same right to contribution was not disputed by Admiralty lawyers of experience in *Gregory v. Orrall*.<sup>2</sup> In that case, the fire companies did part of the work and made no charge; the rest was by the crew and by salvors. That salvage should be brought into contribution was taken for granted; no one intimated that the action of the fire companies had any bearing on the question.

The like rule was followed in *The Roanoke*.<sup>3</sup> In that case, the District Judge notices that the master procured the action of the companies by sounding the alarm. He does this to avoid a discussion of the Massachusetts case which finds that the companies came without being summoned. It by no means appears that his own opinion turned on that point. On appeal this decision was affirmed by the Court of Appeals; and the opinion takes no notice of the fact that the master caused the alarm to be sounded.

A like decision was made in *The Rapid Transit*.<sup>4</sup>

That the master or seamen invited the aid of the fire companies was proved or may be fairly inferred in the cases of *Nelson v. Belmont*, *Gregory v. Orrall*, and *The Roanoke*. In *Gregory v. Orrall*, the master and mate were both on shore, and the fire companies were summoned by some one; I assume that it was by the crew. Such summons is neither proved nor to be inferred in *Nimick v. Holmes*, or *The Rapid Transit*; and what is more important, no argument or question was made or suggested on this point in any case except in *The Roanoke*, where, as I have explained, it was used to meet a citation of the Massachusetts case.

I ought to add that neither in the Massachusetts case nor any other has the mere fact of who spoke first been thought to raise a distinction upon which to hang a great injustice. No court ever could hold that. The distinction taken in the Massachusetts case and in *Ralli v. Troup* is that the municipal companies took control of the operations. It is intimated in the former case that the mas-

<sup>1</sup> 3 Duer, 310; 21 N. Y. 36.

<sup>2</sup> 8 Fed. Rep. 287.

<sup>3</sup> 46 Fed. Rep. 297; 59 Fed. Rep. 161.

<sup>4</sup> 52 Fed. Rep. 320.

ter might be supposed to direct the proceedings when only the single ship was in danger, but not when adjoining property was to be protected. In the *Ralli* case the municipal companies are said to act in all cases by virtue of their public authority. If this is sound, and I think it is, every case in which fire companies have been employed and general average adjudged is an authority in favor of my contention.

I cannot close this discussion, long as it has been, without considering two points which are relied on in the decisions here reviewed.

Mr. Justice Field, in a passage of his opinion which is quoted with approval in the majority opinion in *Ralli v. Troup*, says: "The distinction between a fire put out by the authority of the master, or other person in command, and one put out by public authority is, we think, sound. When a ship has been brought to a wharf, so far as it had become subject to municipal control, if that control is exercised, we think that it stands no differently from any other property within the municipality over which the same control has been exercised; and that the general maritime law does not cover the reciprocal right and objections of the parties to the maritime adventure so far as the consequences of this control are concerned, but that they are to be determined by municipal law." By municipal law is here meant the law of things on land. I must confess my inability to follow this reasoning. That because there is no general average for damage to a house, there should be none for damage to a ship, if both are damaged by fire companies, does not seem to follow, any more than the converse, — that if a fire in a warehouse were extinguished by the fire-pumps of a ship, there should be a contribution.

In the opinion of the Supreme Court a new point is introduced: That the sole object of the sacrifice must be the common good of the particular adventure; and therefore, if the fire companies acted, or may be supposed to have acted, in part with a view to saving the spread of the fire to other property, there can be no claim for general average.

If so, owners must be careful to instruct their masters not to indulge in any altruistic feelings in such cases.

No point is better settled in the law, both civil and criminal, than that if the legal character of an act depends upon the motive with which it was done, and that motive is found to have existed, the case is made out, no matter how many other motives may



have moved the actor in the same direction. I have already shown that the motive of a fire company in pouring water upon a fire is to put out that fire.

The law of general average does not, in my opinion, differ in this respect from the law applied in various ways to other subjects. The three cases cited by the court to establish a difference do not appear to have that effect. Two of them decide that strangers cannot be forced to contribute, as, for instance, if by cutting a cable the master saves his own ship, and thereby benefits another ship, he cannot claim contribution from the latter because it has no connection with the adventure of ship No. 1.<sup>1</sup>

It would seem to follow that if strangers are not to contribute for a benefit conferred on them, the intent to benefit them must be wholly immaterial. These two cases seem to favor my view, if they have any bearing at all upon the question.

The third case is *The Mary*.<sup>2</sup> In that case certain goods had been landed at a port of necessity, and were afterwards destroyed by fire. The evidence was that they were so much damaged that they must have been landed in any event; and also that the examination of the ship would have required them to be landed. Judge Sprague held that the value of the burned goods was not to be brought into the adjustment. No question was made about the extraordinary expense of the unlading itself, and no doubt the adjusters charged this to general average. The decision simply was that the loss could not be considered to have been voluntarily incurred, as it was one which would have occurred in any event. I do not consider that any question of sole motive was present to the mind of the learned judge. At all events, the case does not support the proposition that if the landing of the goods had conferred some possible benefit on a stranger, but was otherwise a subject for contribution between the parties to the adventure, that contribution would not have been due.

In a case in the House of Lords,<sup>3</sup> where a ship was wrecked on the coast of France, and the shipowner sent an agent from England, who incurred large expenses in landing and dealing with the cargo, partly for the purpose of saving the freight, and partly for

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<sup>1</sup> The *John Perkins*, 3 Ware, 89, and 21 Law Reporter, 87; The *James P. Donaldson*, 19 Fed. Rep. 264. The decision in this case is by Brown, J., who gives the dissenting opinion in *Ralli v. Troup*.

<sup>2</sup> 1 Sprague, 17.

<sup>3</sup> *Rose v. Bank of Australasia* (1894), A. C. 687.

the general good of ship, freight, and cargo, and the trial judge had charged these expenses to general average, his judgment, which had been reversed by the Court of Appeal, was restored. No question of sole motive was raised in either court.

Considering the underlying principle of general average, which is that he who receives the benefit should share the burden, and that this has been applied to many cases where neither the master nor any one connected with the command of the adventure has ordered the sacrifice, as in the instances of captors, passengers, seamen, money awarded for a recapture, and for saving a derelict, and that even where the master acts, it is often rather as one in authority than as an agent for the owner of the cargo, I cannot but conclude with Mr. Justice Brown that "there is no distinction in principle between a sacrifice made by a master, and one made by authority of law, provided the common safety of the ship and cargo be the object of the action."

*J. Lowell.*



POLLOCK *v.* FARMERS' LOAN AND TRUST  
COMPANY.

WHEN a court of last resort not only overrules in effect three direct adjudications made by itself, but also refines away to the vanishing point two other of its decisions, and thereby cripples an important and necessary power and function of a coordinate branch of the government, and delivers an opinion in which is laid down a doctrine that is contrary to what has been accepted as law for nearly one hundred years, it is neither improper nor unprofessional carefully and earnestly to scrutinize that decision and the authorities and reasons upon which it is founded. Indeed, it is absolutely necessary to the science of jurisprudence and to the survival of correct legal principles that such a judgment should be subjected to analysis and to whatever criticism an examination of the reasons given for it may reasonably suggest. If it be demonstrably wrong, the consensus of opinion of the legal profession will in time work out the right. If it be demonstrably right, it will stand. As was said by Mr. Justice Gray and Judge Lowell on page 52 of their joint article, "A Legal Review of the Case of Dred Scott," which first appeared in 20 Law Reporter, 61, under the title "The Case of Dred Scott," and was afterwards printed in pamphlet form:—

"We have freely exercised the right, which is allowed to every member of the profession, of controverting arguments and opinions advanced on any legal question by any individual, however distinguished by ability or position, so long as it is not judicially adjudged and settled. But upon the single point adjudicated, more deference is due to the deliberate judgment of the highest tribunal of the country. As two judges, however, and those not the least eminent, do not concur even in the judgment, we feel it to be our duty to examine the soundness of the positions upon which it rests."

No case of recent times has occasioned so much discussion and notoriety as that of *Pollock v. Farmers' Loan and Trust Company*, 157 U. S. 429, and 158 U. S. 601,—the so called "Income Tax Case."

That cause was a bill in equity filed in the Circuit Court of the United States for the Southern District of New York by a citizen

of Massachusetts, a stockholder of shares of a value greater than five thousand dollars in the respondent company, which was a corporation organized under the laws of the State of New York, and having its usual place of business in the city of New York, and certain sums of its capital invested in real estate and in municipal bonds of the said city, and in other personal property. The bill charged that the respondent was about voluntarily to comply with the provisions of sections 27-37<sup>1</sup> of the Act of Congress of August 27, 1894,<sup>2</sup> which it alleged were unconstitutional, null and void,<sup>3</sup> and if the respondent did comply with said sections of the said Act of Congress, it would be exposed to a multiplicity of suits; and the prayer of the bill was that it might be adjudged and decreed that sections 27-37 of the Act of Congress of August 27, 1894, were null and void; and that the respondent might be restrained from voluntarily complying with the provisions therein contained.

The respondent demurred to the bill for want of equity. The demurrer was sustained by the Circuit Court, which allowed an appeal directly to the Supreme Court of the United States.

Although it is nowhere so stated in the report of the case, the government of the United States was evidently allowed either to intervene or to be heard by the Court as an *amicus curiæ*.

Upon the first hearing and argument it was adjudged by a majority of the Supreme Court that so far as these sections attempted to lay and collect a tax upon income derived from rents, they were unconstitutional, as laying a "direct tax" within the meaning of the Constitution without apportioning it; and that also they were unconstitutional so far as they assumed to tax income derived from State and municipal bonds, as being a tax upon the instruments and governmental functions of State governments,

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<sup>1</sup> A most satisfactory summary of these sections will be found in 157 U. S. 434, which lack of space forbids reprinting here.

<sup>2</sup> 28 Stat. 509, 553.

<sup>3</sup> Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers. — *United States Constitution, Art. I., sect. 2, clause 3.*

The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States. — *Id., sect. 8, clause 1.*

No capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. — *Id., sect. 9, clause 4.*

No tax or duty shall be laid on articles exported from any State. — *Id., sect. 9, clause 5.*



over which the United States have no authority or power of taxation. The Court were equally divided upon the questions whether the act, being so far unconstitutional, was wholly invalidated; whether as to the income from personal property as such, the act was unconstitutional as laying "direct taxes" without apportioning them among the States; and whether any part of the tax, if not considered as a "direct tax," was invalid for want of uniformity.<sup>1</sup>

A rehearing was applied for and granted before a full Court, whereupon it was further adjudged by a majority of the Court, adhering to the two points already decided, that the taxes levied without apportionment upon income derived from invested personal property were also "direct taxes," and therefore unconstitutional, and that the said sections of the act being unconstitutional in these particulars were wholly invalid.<sup>2</sup>

The grounds for the judgment of the Court are given in the two opinions delivered by the learned Chief Justice, and appear to be in brief as follows:—

The equity of the bill is sustained because "The jurisdiction of a court equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital or profits has been frequently sustained."<sup>3</sup> No reference is made by the Chief Justice to Rev. Sts. § 3224, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court."

The constitutional questions involved are approached and decided from the historical point of view. "It appears that prior to the adoption of the Constitution nearly all the States imposed a poll tax, taxes on land, on cattle of all kinds, and various kinds of personal property."<sup>4</sup> The clause in the Constitution regarding direct taxes was the result of a compromise between conflicting views, "resting on the doctrine that the right of representation ought to be conceded to every community on which a tax is to be imposed, but crystallizing it in such form as to allay jealousies in respect of the future balance of power; to reconcile conflicting views in respect of the enumeration of slaves; and to remove the objection that, in adjusting a system of representation between the States, regard should be had to their relative wealth, since those

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<sup>1</sup> 157 U. S. 586.

<sup>2</sup> 158 U. S. 637.

<sup>3</sup> *Dodge v. Woolsey*, 18 How. 331; *Hawes v. Oakland*, 104 U. S. 450; 157 U. S. 553.

<sup>4</sup> 157 U. S. 559.

who were to be most heavily taxed ought to have a proportionate influence in the government. The compromise, in embracing the power of direct taxation, consisted not simply in including part of the slaves in the enumeration of population, but in providing that as between State and State such taxation should be proportioned to representation."<sup>1</sup> It is then shown by various citations from the writings and speeches of members of the Constitutional Convention that it was expected that most of the revenue would be derived from duties on imports, and that divers of them used language in regard to the phrase "direct taxes" which would include direct taxes on personal property. The debate on the Act of June 5, 1794,<sup>2</sup> which placed a tax upon carriages, is referred to, and reference is also made to Madison's opinion that that act was unconstitutional, and more weight seems to be given to Mr. Madison's opinion than to that of the Supreme Court in *Hylton v. United States*,<sup>3</sup> which held that act to be constitutional, and no allusion is made to the fact that Madison apparently changed his opinion as to the constitutionality of such acts, since, when President, he signed several bills of like import.<sup>4</sup>

The learned Chief Justice, after citing all the acts of Congress which have levied either direct taxes or income taxes, asserts that all of them were passed as war measures.<sup>5</sup> He then discusses the four cases of *Pacific Insurance Co. v. Soule*,<sup>6</sup> *Veazie Bank v. Fenno*,<sup>7</sup> *Scholey v. Rew*,<sup>8</sup> *Springer v. United States*,<sup>9</sup> and holds them to be either not in point or else not to be controlling. He then says that a tax upon the income derived from real estate is a tax upon real estate, because as Lord Coke says, "What is the land but the profits thereof?"<sup>10</sup> And therefore that the tax upon income derived from rents and real estate is a tax upon land, and that a tax upon land is a "direct tax" within the meaning of the Constitution, and unconstitutional because not apportioned.

The logical result of this was extended upon the rehearing to income derived from personal property,<sup>11</sup> because "it would seem [to be] beyond reasonable question that direct taxation, taking the place as it did of requisitions, was purposely restrained to apportionment according to representation, in order that the former system

<sup>1</sup> 157 U. S. 563.

<sup>2</sup> 1 Stat. 373.

<sup>3</sup> 3 Dall. 171; 157 U. S. 569, *et seq.*

<sup>4</sup> 158 U. S. 649.

<sup>5</sup> 157 U. S. 572 & 573.

<sup>6</sup> Wall. 433.

<sup>7</sup> 8 Wall. 533.

<sup>8</sup> 23 Wall. 331.

<sup>9</sup> 102 U. S. 586.

<sup>10</sup> Co. Lit. 4 b.

<sup>11</sup> 158 U. S. 618.



as to ratio might be retained, while the mode of collection was changed."<sup>1</sup> "The reasons for the clauses of the Constitution in respect of direct taxation are not far to seek. The States, respectively, possessed plenary powers of taxation. They could tax the property of their citizens in such manner and to such extent as they saw fit; they had unrestricted powers. . . . They gave up the great sources of revenue derived from commerce; they retained the concurrent power or [of] levying excises, and duties if covering anything other than excises; but in respect of them the range of taxation was narrowed by the power granted over interstate commerce, and by the danger of being put at disadvantage in dealing with excises on manufactures. They retained the power of direct taxation, and to that they looked as their chief resource; but even in respect of that, they granted the concurrent power, and if the tax were placed by both governments on the same subject, the claim of the United States had preference. Therefore, they did not grant the power of direct taxation without regard to their own condition and resources as States."<sup>2</sup> "The founders anticipated that the expenditures of the States, their counties, cities, and towns, would chiefly be met by direct taxation on accumulated property, while they expected that those of the Federal government would be for the most part met by indirect taxes. And in order that the power of direct taxation by the general government should not be exercised, except on necessity; and, when the necessity arose, should be so exercised as to leave the States at liberty to discharge their respective obligations, and should not be so exercised, unfairly and discriminatingly, as to particular States or otherwise, by a mere majority vote, possibly of those whose constituents were intentionally not subjected to any part of the burden, the qualified grant was made."<sup>3</sup> "We find it impossible to hold that a fundamental requisition, deemed so important as to be enforced by two provisions, one affirmative and one negative, can be refined away by forced distinctions between that which gives value to property, and the property itself. Nor can we perceive any ground why the same reasoning does not apply to capital in personalty held for the purpose of income or ordinarily yielding income, and to the income therefrom."<sup>4</sup> "Nor are we impressed with the contention that, because in the four instances in which

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<sup>1</sup> 158 U. S. 619.<sup>2</sup> 158 U. S. 620.<sup>3</sup> 158 U. S. 621.<sup>4</sup> 158 U. S. 628.

the power of direct taxation has been exercised, Congress did not see fit, for reasons of expediency, to levy a tax upon personalty, this amounts to such a practical construction of the Constitution that the power did not exist, that we must regard ourselves bound by it."<sup>1</sup> And the further argument is insisted upon by the learned Chief Justice, that, if a tax upon the income derived from municipal bonds is unconstitutional because it is a tax on the power of the States, the tax upon all incomes derived from invested properties must also be unconstitutional, because it is a "direct tax" upon the sources from which the income is derived, and is not apportioned. <sup>2</sup>

It is to be noted that in both the elaborate opinions delivered by the Chief Justice no case is cited by him in support of the conclusion of the Court. For it is to be observed that the three English cases, *Attorney-General v. Queen Insurance Co.*,<sup>3</sup> *Attorney-General v. Reed*,<sup>4</sup> and *Bank of Toronto v. Lambe*,<sup>5</sup> cited to the point that an income tax is a "direct tax," are hardly apposite.<sup>6</sup> In the first place, only the last one lays down the doctrine contended for, and that was apparently a self evident proposition, for the tax under consideration in that case was levied upon certain businesses by an act which professed to levy "certain direct taxes." The taxes under consideration in the first two cases were held *not* to be direct. In the second place, the question at bar was not what was or was not actually a direct tax, but what was a "direct tax" within the meaning of the Constitution of the United States. Furthermore, the assertion may be safely made that no case can be cited in support of the conclusion of the majority of the Court.

In regard to the question of the jurisdiction of a court of equity to entertain such a bill as this, there could be, of course, no question, if it were not for Rev. Sts. § 3224, above referred to. That part of the opinion of the Court which deals with this point cannot be criticized or answered better or more forcibly than is done by Mr. Justice White in his remarkably lucid, logical and powerful dissenting opinion: "Neither of these authorities [*viz.*: *Dodge v. Woolsey*, 18 How. 331; *Hawes v. Oakland*, 104 U. S. 450], I submit, is in point. In *Dodge v. Woolsey*, the main question at issue was the validity of a State tax, and that case did not involve the Act of Congress to which I have referred [*viz.*: Rev. Sts.

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<sup>1</sup> 158 U. S. 629.

<sup>2</sup> 158 U. S. 630.

<sup>3</sup> 3 App. Cas. 1090.

<sup>4</sup> 10 App. Cas. 141.

<sup>5</sup> 12 App. Cas. 575.

<sup>6</sup> 158 U. S. 631.



§ 3224, Stat. 1867]. *Hawes v. Oakland* was a controversy between a stockholder and a corporation, and had no reference whatever to taxation.”<sup>1</sup> “The decision here is, that this court will allow, on the theory of equitable right, a remedy expressly forbidden by the statutes of the United States.”<sup>2</sup>

There can be no question as to the unconstitutionality of the tax upon the income derived from State and municipal bonds or upon the salaries of State or municipal officers. One sovereignty has no power of taxation on or over the instruments of government of another; and there was no controversy or difference, and there can be none, as to this, or as to the lack of power in the States to burden with taxation the instrumentalities of interstate or foreign commerce.<sup>3</sup> But the argument deduced from this in the opinion of the Court, to the effect that, if such taxation is unlawful because it creates a burden upon a subject over which there is no right or power of taxation, it must be direct taxation, and therefore the tax upon all incomes derived from invested properties must also be “direct” and unconstitutional because not apportioned among the several States, is fallacious; indeed, it is doubly fallacious.<sup>4</sup> In the first place, the attempted taxation of the instruments of government of another sovereignty, or the attempted placing of a burden by a State upon the instrumentalities of interstate or foreign commerce, has never been held to be direct taxation. That question could not possibly arise, for it is sufficient to make the tax invalid, if *any* burden, howsoever remote, is imposed. In the second place, it is one thing to hold that where there is no right of taxation at all, as in the case of one government taxing the instrumentalities of another sovereignty, any tax, however indirect, upon any money or property derived in any way from the legitimate exercise of those governmental functions is a burden upon them; and it is quite another thing to hold that, given the power and right to lay taxes upon certain subjects in certain ways, a tax is unconstitutional because it lays a burden indirectly, which it could not lay directly except by a different method.<sup>5</sup> There can be no question that the government of the United States has the power and the right to lay and collect taxes in some way upon all the property within its jurisdiction and subject to its sovereignty, and no valid

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<sup>1</sup> 157 U. S. 609.

<sup>2</sup> 157 U. S. 611.

<sup>3</sup> 157 U. S. 646; 158 U. S. 630; 158 U. S. 665.

<sup>4</sup> 157 U. S. 584; 158 U. S. 630.

<sup>5</sup> 157 U. S. 646; 158 U. S. 665; 158 U. S. 691.

argument can be deduced against this right from an unsuccessful attempt to collect a tax upon a subject beyond its sovereignty. The question is not whether any burden can be placed upon land or other property by taxes levied by the rule of uniformity, but whether such burden be "direct taxation" or not within the meaning of the Constitution. Indeed, Mr. Justice Brown, in his dissenting opinion, after admitting that "a tax upon the rents or income of real estate is a tax upon the land itself," — a proposition which, it is submitted, is not true, — goes on to say: "But this does not cover the whole question. To bring the tax within the rule of apportionment, it must not only be a tax upon land, but it must be a *direct* tax upon land. . . . It does not follow . . . that every tax upon land is a direct tax. . . . It seems to me that it could hardly be seriously claimed that a tax upon the crops and cattle of the farmer, or the coal and iron of the miner, though levied upon the property while it remained upon the land, was a direct tax upon the land. A tax upon the rent of land in my opinion falls within the same category. . . . While . . . it is a tax upon land, it is a direct tax only upon one of the many profits of land."<sup>1</sup> It is evident that the argument of the learned Chief Justice proves too much, for it proves that any tax levied upon any property or upon any proceeds of property is a "direct tax," and therefore cannot be levied by the United States except by the rule of apportionment.

The argument based upon Lord Coke's statement to the effect that land is nothing but the profits thereof:<sup>2</sup> that a tax on rents is a "direct tax" upon the land, is, it is submitted with all deference, a complete *non sequitur*. For here the tax was upon rents already received, and no one can contend that the gift or sale or devise of such would pass the land itself, as a general conveyance or devise of all rents does. Even where there is a limited gift of rents, it does not pass the land,<sup>3</sup> and it is well settled that a tax upon rents and a tax upon the land itself are not double taxation.<sup>4</sup> Besides, a tax upon the income derived from land or upon its beneficial use is by no means analogous to a grant of the entire beneficial use. The one is a yearly and transient levy, the other is a grant of all interest in the land.

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<sup>1</sup> 158 U. S. 692.

<sup>2</sup> Co. Lit. 4 b.; 157 U. S. 580.

<sup>3</sup> Fox v. Phelps, 17 Wend. 393; 157 U. S. 589-590; 157 U. S. 646; 158 U. S. 667; 158 U. S. 692.

<sup>4</sup> 158 U. S. 702.



With regard to the historical argument in support of the judgment of the Court, besides the passages already quoted *verbatim* and others summarized as indicative of the historical material cited and relied upon by the learned Chief Justice, the following is his own summary of the results of his elaborate historical researches: "From the foregoing it is apparent: 1. That the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it. 2. That under the State systems of taxation all taxes on real estate or personal property or the rents or income thereof were regarded as direct taxes. 3. That the rules of apportionment and of uniformity were adopted in view of that distinction and those systems. 4. That whether the tax on carriages was direct or indirect was disputed, but the tax was sustained as a tax on the use and an excise. 5. That the original expectation was that the power of direct taxation would be exercised only in extraordinary exigencies, and down to August 15, 1894, this expectation has been realized."<sup>1</sup>

In regard to number five of this category of propositions it may be enough to say that it is scarcely an argument. Given the power of Congress to lay and collect a general income tax, no court can stipulate the time when that power shall or can be exercised. That is solely a question of expediency to be solved and determined by Congress alone. Moreover, it is conceived that if Congress has no power to levy certain taxes except in certain ways in ordinary times of peace, it has no power to levy them in other ways in time of war, and so nothing is gained by the fact insisted upon by the learned Chief Justice that all the prior income and direct taxes, which have been levied by Congress according to the rule of uniformity, were war measures.<sup>2</sup>

With number four of the above heads no quarrel can be had. Number three depends solely upon the validity of numbers one and two, and is a corollary to them.

If the question were not fundamental, lying at the very root of the whole subject, it would perhaps be enough to cite a sentence from the opinion of the Chief Justice, found ten pages prior to that upon which is contained proposition one, in answer thereto. The Chief Justice writes:<sup>3</sup> "Mr. Madison records: 'Mr. King

<sup>1</sup> 157 U. S. 573.

<sup>2</sup> 157 U. S. 572, 573, 583; 158 U. S. 621; 158 U. S. 677.

<sup>3</sup> 157 U. S. 563.

asked what was the precise meaning of direct taxation. No one answered.'” Furthermore, it most definitely appears that no one then knew what the term “direct taxes” actually meant. No two of the members of the Constitutional Convention and statesmen of that time gave the words the same interpretation. And it can confidently be affirmed, with all deference, that no one has ever known or does now know with certainty all that the term implies. The Supreme Court of the United States on May 20, 1895, stood divided upon the question five to four.<sup>1</sup>

But the question is deeper than this, and cannot be thus cavalierly disposed of.

It seems to me that nothing is gained by the elaborate and exhaustive researches which have been made into the debates and writings in regard to the clauses relating to taxation in the Constitution.<sup>2</sup> These researches have only proved that some men held one opinion in regard to the meaning of “direct taxes,” and some another, and that some changed their opinion. It is not of very great importance that James Madison believed that the Carriage Tax Act of 1794 was unconstitutional, and that later, when President of the United States, he signed bills passed by Congress which provided for the exaction of the same kind of taxes.<sup>3</sup> But, if it be important, as the majority of the Supreme Court seem to think, the facts as to Mr. Madison’s opinion and change of opinion certainly strengthen the argument for the constitutionality of the income tax. It is a man’s final opinion that is of the greatest weight, as it is a court’s, especially when the man and the court have overruled their former judgments.

Every one knows, who knows anything at all about our constitutional history and constitutional law, the facts and considerations and conditions which led to the framing and adoption of our Constitution. It would be idle to reiterate them here. In the light of those circumstances the Constitution is to be construed, and in the light of those alone. All the arguments and citations were before the Supreme Court of the United States in *Springer v. United States*,<sup>4</sup> which were presented to it in the case under discussion,<sup>5</sup> but did not appear to be of any great weight to the then members of the Court. Indeed, it is submitted, with the greatest deference, that the weight given to Madison’s original opinion

<sup>1</sup> 157 U. S. 559, 562, 563, 565-572; 158 U. S. 620, 622-629; 158 U. S. 649.

<sup>2</sup> 158 U. S. 699.

<sup>3</sup> 158 U. S. 649.

<sup>4</sup> 102 U. S. 586.

<sup>5</sup> 157 U. S. 636.



by the present learned Chief Justice of the United States is due to the fact that it has unfortunately escaped his notice that Madison's final opinion was in favor of the constitutionality of such acts as the Carriage Tax Act. And it is further conceived, with the greatest deference, that too much weight was given to the learned and brilliant brief of Alexander Hamilton, who appeared for the United States in *Hylton v. United States*.<sup>1</sup> He was Secretary of the Treasury when the Carriage Tax Bill was passed, and his brief and argument in support of that act, by making a limited contention, ought not to be taken as his whole opinion. But even in that brief he says, as quoted by Mr. Chief Justice Fuller: "The following are presumed to be the only direct taxes: Capitation or poll taxes, taxes on lands and buildings, general assessments, whether on the whole property of individuals or on their whole real or personal estate."<sup>2</sup> Thus evidently meaning that a tax to be "*direct*" must be levied upon the *whole* real or personal property of all the inhabitants.

Provision is made in the Constitution for the levy and collection of all kinds of taxes known at the time of the making and adoption of that instrument. Excises, imposts, duties, capitation and direct taxes are all authorized *eo nomine*, and provision made for their assessment. If it be true that there are *direct* taxes which may be levied under the Constitution uniformly and *not* by apportionment, it is apparent that the term "direct taxes" in that instrument must have a limited and special meaning. Now, besides capitation taxes, which necessarily are direct, and which by the terms of the Constitution are to be levied by the rule of apportionment, if there ever was a direct tax, it was the carriage tax, the constitutionality of which was supported in *Hylton v. United States*,<sup>3</sup> and the succession tax levied by the Act of June 30, 1864,<sup>4</sup> and supported in *Scholey v. Rew*,<sup>5</sup> both of which were levied under the rule of uniformity. It is begging the question utterly to call them excises. Indeed, the remark of the learned Chief Justice in *Pollock v. Farmers' Loan & Trust Co.*, that "what was decided in the *Hylton* case was, then, that a tax on carriages was an excise, and, therefore, an indirect tax," is, it is submitted, totally unintelligible, unless it is meant thereby that the carriage tax was not a "direct tax" within the meaning of the Constitution.<sup>6</sup>

<sup>1</sup> 3 Dall. 171.

<sup>4</sup> 13 Stat. 287; 14 Stat. 140, 141.

<sup>2</sup> 7 Hamilton's Works (Lodge's ed.), 332; 157 U. S. 572. <sup>5</sup> 23 Wall. 331.

<sup>3</sup> 3 Dall. 171.

<sup>6</sup> 158 U. S. 627.

The question therefore arises what is the limited meaning of the words in the Constitution?

It seems apparent on the face of the Constitution that the framers of it meant to indicate specifically all the different methods and forms of taxation, and to prescribe the manner in which each should be collected. Excises have been levied and collected according to the rule of uniformity, regardless of the fact that they were also direct taxes. It is strange that the form of direct taxation which was then most common and best known—namely, taxation of land—should not have been named or referred to. Indeed, it seems to have been almost the only subject of direct taxation by the States.<sup>1</sup> It is hardly possible that it could have escaped the attention of the Constitutional Convention, and it is conceded upon all hands that a direct tax upon land must be apportioned. If it be true, as is stated by Mr. Chief Justice Chase in *Veazie Bank v. Fenno*,<sup>2</sup> that in many, if not all, of the Southern States slaves were considered and held to be real property,<sup>3</sup> it follows that direct taxes on slaves would have to be apportioned. If there be validity in this suggestion, which seems to have escaped the notice of the learned counsel who argued the cause, and of all the members of the Court, we find again in this curious provision with regard to "direct taxes" the evasion of the Constitution as to slavery. But, if this be not so, and slaves were considered to be personalty, as seems to have been the case in the five original slave States, except Virginia,<sup>4</sup> still slaves are denominated as "persons" in the Constitution, and as such are clearly subject to capitation taxes, *Veazie Bank v. Fenno*,<sup>5</sup> which must also be apportioned. Indeed, no tax upon slaves is conceivable that is not a capitation tax, unless it be a license tax. And this suggestion is borne out strikingly by the early statutes of the United States, which levied

<sup>1</sup> 158 U. S. 686 ; 158 U. S. 699 ; 158 U. S. 701.      <sup>3</sup> 158 U. S. 650.

<sup>2</sup> 8 Wall. 533, 543.

<sup>4</sup> I am indebted for the greater part of the material for this note to Mr. James Parker Hall.

<sup>5</sup> Slaves were made real property in Virginia by Stat. 1705, c. 23, § 1. 3 Hen. 333. See also Stat. 1727, c. 11, § 3. 4 Hen. 222. Slaves were declared to be personal property in South Carolina by Stat. 1740; 3 S. C. Stat at Large. 568; and in Georgia by Stat. 1770, c. 203, § 1; Dig. Laws of Georgia, 163. Apparently there was no legislation on the subject in Maryland or North Carolina, at least neither Mr. Hall nor I have been able to find any. While there is no direct adjudication upon the point in either of these two latter States, the cases seem to assume that slaves were chattels. See 1 Hurd's Law of Freedom and Bondage, chap. vi., p. 222.

<sup>5</sup> 8 Wall. 533, 543.



direct taxes upon real property and slaves, and apportioned them among the several States.<sup>1</sup> These statutes, therefore, cannot be considered as sustaining the doctrine that a direct tax upon personalty must be apportioned.

It seems, therefore, if either of the suggestions which I have made be valid, that the terms "direct taxes" in the Constitution means only what it has been considered to mean for nearly one hundred years; namely, a direct tax upon real estate only. But even if this is not so, still the term must mean *direct* taxes, and it need not be, and it ought not to be, admitted that the taxes levied by sects. 27-37 of the Act of Congress of August 27, 1894, are direct taxes in any sense, either upon land or any invested property. As is said by Mr. Justice White: "The point involved is whether a tax on net income, when such income is made up by aggregating all sources of revenue and deducting repairs, insurance, losses in business, exemptions, etc., becomes to the extent to which real<sup>e</sup> estate revenues may have entered into the gross income, a direct tax on the land itself. In other words, does that which reaches an income, and thereby reaches rentals indirectly, and reaches the land by a double indirection, amount to direct levy on the land itself?"<sup>2</sup> It is submitted that this is an absolutely unanswerable argument, and yet it is nothing but a plain statement of fact; and the same argument applies to the tax on income derived from personalty. The question is not whether Congress can or cannot levy a tax upon personalty, as it is stated to be in the opinion of the majority of the Court,<sup>3</sup> but whether Congress must apportion a direct tax levied upon personalty. No one contends or believes that the United States cannot tax personal property directly in some way.

It is not true that Congress has hitherto neglected to exercise its right of taxation on personal property, as seems to be intimated by the learned Chief Justice.<sup>4</sup> Beside the Carriage Tax Act of June 5, 1794, direct taxes on personal property were levied by the rule of *uniformity* by the Act of January 18, 1815, c. 22, 3 Stat. 180, by which duties were imposed upon (among other articles) pig-iron, hats, caps, and umbrellas, manufactured or made for sale within the United States. By the Acts of July 1, 1862, c. 119, 12 Stat. 432, 473; June 30, 1864, c. 173, 13 Stat. 223, 281; March 3, 1865, c. 78

<sup>1</sup> Acts of July 14, 1798, c. 75, 1 Stat. 597; August 2, 1813, c. 37, 3 Stat. 53; January 9, 1815, c. 21, 3 Stat. 164; March 5, 1816, c. 24, 3 Stat. 255.

<sup>2</sup> 157 U. S. 645.

<sup>3</sup> 158 U. S. 629.

<sup>4</sup> 158 U. S. 629.

13 Stat. 469, 479; March 10, 1866, c. 15, 14 Stat. 4, 5; March 2, 1867, c. 169, 14 Stat. 471, 480; July 14, 1870, c. 255, 16 Stat. 256; taxes were imposed upon incomes whether derived from any kind of property, rents, interest or from any source whatever, and levied by the rule of *uniformity*.<sup>1</sup>

The cases of *Hylton v. United States*,<sup>2</sup> *Pacific Insurance Co. v. Soule*,<sup>3</sup> *Veazie Bank v. Fenno*,<sup>4</sup> *Scholey v. Rew*,<sup>5</sup> *Springer v. United States*,<sup>6</sup> have been so elaborately discussed in the opinions of the majority and minority of the Supreme Court that no useful purpose would be served by reiterating an analysis of them here. Suffice it to say, that *Pollock v. Farmers' Loan & Trust Co.* at the very least is utterly inconsistent with the reasoning of *Scholey v. Rew* as to the tax upon income derived from rentals, and *Hylton v. United States* and *Springer v. United States* as to the tax on income derived from personal property.

If the views of the minority of the Justices of the Supreme Court of the United States in *Pollock v. Farmers' Loan & Trust Co.* should in the end prevail, it would not be the first instance within very recent times of such an event, when the majority of the Court have overruled a line of decisions upon a question of constitutional law, which had been considered as settling the point. *Plumley v. Massachusetts*<sup>7</sup> in effect overrules *Leisy v. Hardin*.<sup>8</sup>

*Francis R. Jones.*

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<sup>1</sup> 158 U. S. 651; see also 157 U. S. 626.

<sup>2</sup> 3 Dall. 171.

<sup>3</sup> 7 Wall. 433.

<sup>4</sup> 8 Wall. 533.

<sup>5</sup> 23 Wall. 331.

<sup>6</sup> 102 U. S. 586.

<sup>7</sup> 155 U. S. 461.

<sup>8</sup> 135 U. S. 100.



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THE LAW SCHOOL.—The year starts with some changes in the curriculum. Professor Langdell has discontinued his course upon Suretyship and Mortgage, and in its place a course on Suretyship will be given under Professor Ames, who, in turn, has given up his course on Quasi Contracts. The half-course, Contracts II. has been merged into the former course on Quasi-Contracts, and both will now be given together as one course under Professor Wambaugh. Professor Beale has undertaken the course on International Law in the college, and some other changes of minor importance have been made.

The returns now at hand show a proportionally unprecedented increase in the numbers of the school. Full statistics will be given in the December number.

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THE NEW QUINQUENNIAL CATALOGUE.—Those members of the Harvard Law School Association who were present at the Langdell Anniversary celebration in June were each made the recipient of the new catalogue, and any members who have not as yet received a copy should apply for one at once to the librarian. The catalogue accounts for 6,210 past and present members of the school, as against 5,470 in the last quinquennial. A complete geographical list of living graduates is introduced for the first time, affording ready reference to the body of Harvard Law School men in every part of the country. As this book supersedes the previous catalogues of the Law School Association, the names of its members appear in the geographical list in small capitals. The catalogue is put forth as the joint work of the Association and of the School, but the greater portion of the labor fell upon the librarian; and it was in appreciative recognition of this fact that Mr. Arnold was unanimously elected to honorary membership at the last annual meeting. The preparation of a work of this kind involves an enormous amount of labor, and the whole body of our graduates is to be congratulated upon its successful completion.

AN AGENT'S AUTHORITY BY NECESSITY.—In 8 HARVARD LAW REVIEW, 496, a note occurs on the subject of an agent's authority by necessity, based on the case of *Gwilliam v. Twist*, 11 *The Times*, L. R. 205. This case has subsequently been reversed, but on grounds which in no wise impugn the propositions of law laid down in the lower court, the *ratio decidendi* being that the facts of the particular case did not raise the question of necessity at all. See *Gwilliam v. Twist*, 11 *The Times*, L. R. 415.

THE INCONSISTENCIES OF THE LAW OF GIFTS.—The May-June number of the American Law Review, has an interesting article by C. B. Labatt, Esq., of the New York bar, on the inconsistencies of the law of gifts. The writer deplores the wide difference between the present rule at common law which makes delivery or a deed essential, in a gift of the legal title, and the rule of equity which makes a gratuitous declaration of trust sufficient, in a gift of the equitable interest. He suggests that this rule of equity may have had its origin in an enactment of Justinian, and is of opinion that its utter inconsistency with the rule at common law is to be explained only by the peculiar historical position of the Court of Chancery.

One is rather puzzled at this because it omits all mention of the case of *Ex parte Pye* (18 Ves. 140), and seems to assume that the present rule regarding declarations of trust is as old as the Court of Chancery itself. But surely the rule before the decision in *Ex parte Pye* was, and for three centuries had been, against the validity of a gratuitous declaration of trust. In Doctor and Student, in the first part of the sixteenth century, it was taken for law that while a man could, for no consideration, transfer his equitable interest in property of which another was trustee, he could not, without consideration, grant an equitable interest in his own property, by declaring himself a trustee. In the one case the transaction between donee and donor was complete. The donee asked the aid of equity, not against the donor, but against the trustee, and as the trustee had received something, equity compelled him to account for it. In the other, the donee asked the aid of equity to complete the promised gift of the donor. The donor had received nothing, and equity declined to interfere. (Doctor and Student, Dialogue II., chap. 22, 23.) The rule was perfectly consistent, and at the beginning of the nineteenth century was still taken to be good sense and good law. *Sloane v. Cadogan* (Sugden, 3 Vend. & Pur., 10th ed., App. 66). Three years after this case, in 1811, Lord Eldon, the most conservative of Chancellors, made, in *Ex parte Pye*, the famous decision which first gave effect to gratuitous declarations of trust, and involved the law in its present inconsistencies. Thus the difficulty in the law of gifts, so far as the rules of equity are responsible for it, is not yet one hundred years old.

Mr. Labatt thinks it improbable that in these rationalizing days, this branch of law can remain unchanged, and he predicts that the change, when made, will be a compromise, which, while "prohibiting merely informal gifts," will mitigate the "stern and unbending rule of the common law by permitting certain evidential facts to stand as an adequate substitute for delivery." Perhaps a simpler remedy—if it is necessary to have a remedy—would be to abolish by statute the doctrine of *Ex parte Pye*. That would restore the doctrine of equity to its former satisfactory condition, put an end to the inconsistency of which Mr. Labatt



complains, and leave untouched the rule at common law which after the half-century of conflict (if one may borrow the expression) following *Irons v. Smallpiece* (3 B. & Ald. 551) is, there is reason to hope, at last settled.

THE VALUE OF HONEST INTENTIONS. In *Nash v. Minnesota Title & Insurance Co.* (40 N. E. R. 1039), an action of deceit, a majority of the Supreme Judicial Court of Massachusetts decided that a defendant who had written a letter reasonably to be understood as warranting a title, might show that the letter was intended to convey another meaning. In this opinion the majority follows *Derry v. Peek*, 14 App. Cas. 337 (noted in 3 HARVARD LAW REVIEW, 231). Field, C. J., and Holmes, J., dissented, arguing, as does Sir Frederick Pollock in 5 Law Quar. Rev. 410, that a man should be bound by a reasonable interpretation of his words when he knows others will act upon them. Though not cited by the Court, a *dictum* in *Litchfield v. Hutchinson*, 117 Mass. 195, also appears to support this view.

There seems little doubt that the decision of the majority is right on historical grounds, but whether it is in thorough touch with the trend of the law, is a dubious question. The present tendency certainly seems to be in favor of requiring moral fraud for deceit, on the ground that it is hard to subject the honest giver of gratuitous information to the determination of the jury as to its good sense; yet in the case of a gratuitous bailee more than mere honesty is required, and the two cases are not easily distinguishable. The ground of the decision, therefore, probably lies as much as anywhere in the greater hesitation of the courts to give security to the seeker of information than to the possessor of property rights.

RETREATING TO THE WALL.—*Beard v. United States*, 15 Sup. Ct. Rep. 962, is a recent case which has perhaps attracted more attention than its actual decision warrants. The defendant was feloniously assailed and killed his man without "retreating to the wall." The substance of the charge in the court below was that if he could have avoided taking life by getting out of the way, he was guilty of manslaughter. On error, this charge, which takes no account of what may have reasonably appeared necessary to the prisoner at the time of the killing, was very naturally held erroneous by the Supreme Court, and the judgment reversed.

On the facts of the case the decision seems unexceptionable; namely, that when a man is murderously assaulted, he need not pause and speculate as to whether retreat would be safe and expedient, but is entitled to meet the attack with such force as he honestly believes, and has reasonable ground to believe, is necessary to save his life or protect himself from serious injury. It is the *dicta* in Mr. Justice Harlan's opinion, however, which, although quite unnecessary to the decision, have attracted such wide attention. Their general purport is that in case of a *felonious* assault the doctrine of retreating to the wall does not apply. On this point the Court shows a leaning toward the view held by Bishop and Wharton and other dissenters from the old doctrine of the common law. Nevertheless, the earlier view, supported by equal authority, seems more consistent with principle. Resistance to an assault, where life is not involved, may be allowed in kind; but killing to prevent a felony, in this as in other cases, should be justifiable only where no other reasonable

means of prevention is apparent. Though the assailant is a criminal, it is not the province of his intended victim to mete out punishment. His right is merely that of self-defence, and if retreat is an apparently reasonable means of exerting that right, then the sanctity of human life should be respected.

A QUESTION OF JURISPRUDENCE. — While the careful demarcation of the regions of contract and tort is generally regarded as a mere scholasticism, it has in England — owing to the County Courts Act of 1846, which taxes costs differently as the action is “founded on contract or tort” — become a living issue. The essential element of contract being the *consensus*, and that of tort the universal duty to refrain from injury, the question arises in which category shall a duty to act, imposed by law, such as the carrier's obligation to receive and carry safely, be placed. Clearly it is neither a tort, a duty to refrain, nor a contract, a voluntary obligation, but an entirely different thing, a legal duty, — a relation which has found no expression in the forms of action, and must, therefore, be dealt with as either a contract or tort. In this country legal duties have been treated, generally, as torts (*Ames v. Ry.*, 117 Mass. 541), while in England the authorities have differed widely, some regarding cases of this character as founded on contract, others, the most recent cases, as founded on tort, “the view which prevails in all the earlier authorities, and which underlay the action of *assumpsit* itself” (11 L. Q. R. 214). In the two latest cases on the subject, *Taylor v. M., S. & L. Ry.* '95 1 Q. B. 134, 64 L. J. Q. B. 6 (commented on in 8 HARVARD LAW REVIEW, 290), and *Kelly v. Met. Ry.* '95, 1 Q. B. 944, the Court of Appeal has maintained the latter view and has arrived at the result that an action against a railroad company for an injury received, is, whether a contract exist or not, one founded on tort, within the meaning of the County Courts Act. In the former case, the negligence was a positive misfeasance, in the latter, a mere omission, so that a very wide field is covered by these two decisions.

If they are to stand as law, a very radical change will, probably, ensue. The case of *Alton v. Midland Ry. Co.* 19 C. B. N. S. 213, deciding that a master cannot recover for loss of a servant's services, caused by the negligence of a railway company, when the contract of carriage is with the servant, — a case already tottering (Pollock on Torts, 446-447), — must now be considered as overruled; and a surprisingly large number of old cases, involving important points, will probably be unable to bear examination in the light of these decisions. The effect will not be confined to the subject of jurisprudence merely, but will have a great influence throughout the whole field of substantive law. Its theoretic correctness, on the other hand, may, perhaps, be doubted. There are certainly high authorities who oppose this view (Holland, *Jurisprudence*, 223-224), although it seems, after all, to be the better one. A legal duty resembles a tort very much, except that one is affirmative and the other negative; while between a contract, whose very essence is a voluntary personal relation, and a legal duty, an obligation forced on a party against his will, there is little in common. Granting this, a farther problem remains, how to treat those situations in which, presupposing a previous relation founded on contract, the parties find themselves under duties imposed by law practically similar to those which they have contracted to perform, as in ordinary bailment. This is not, perhaps, to be



considered as settled by these two cases, although it is believed that a similar decision would be equally satisfactory.

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INNKEEPER'S LIEN. — The recent case of *Robins & Co. v. Gray*, in the English Court of Appeal, according to the report in 11 *The Times*, L. R. 569, brings up an interesting point. A commercial traveller did not pay his hotel bill, and the proprietor set up a lien on certain articles in his custody, although he had known all along that they were the property of the salesman's employer. The court held that, as the innkeeper was bound to receive the articles, regardless of whose they were, he was entitled to his lien, notwithstanding his private knowledge of the ownership. Lord Esher's opinion is refreshing. Whether agreeing with his conclusion or not, all will welcome so clear and straightforward a treatment of a subject which has often been handled vaguely and unsatisfactorily.

The statement in the opinion that the decision represents what has been the undisputed law for centuries seems rather broad. The judges who decided *Broadwood v. Granara*, 10 Exch. 417, and *Threfall v. Borwick*, L. R. 7 Q. B. 711, for instance, apparently had a contrary principle in mind. And Wharton, in his book on Innkeepers, page 119, makes the unqualified assertion that the innkeeper has no lien on goods he knows are not the property of the guest. That this view has often been taken in America, too, is shown by such cases as *Cook v. Kane*, 13 Oreg. 482, and *Covington v. Newberger*, 99 N. C. 523. However, the doctrine of the case under discussion seems clearly preferable. As the innkeeper's lien is grounded, not on the credit he gives his guest on the faith of the goods, but on the extraordinary liability imposed on him by law, it seems only just that on all goods which he is bound to receive he should have his lien, whether or not he knows them to be the property of another than his guest. As to articles which he is not bound to receive, his state of knowledge or ignorance may be material, but in the ordinary case, where he has no choice, it should not be the crucial test.

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DECLARATIONS OF INTENTION. — A recent Indiana case seems to indicate that the law concerning declarations of intention is not everywhere in an advanced stage of development. The case was *Wilson v. Smelser* (41 N. E. Rep. 76), an action for breach of contract of marriage. The court held that although the plaintiff's intention (as showing consent on her part to the contract) was material, evidence that she had told her parents she was going to be married in October was inadmissible, because not made during the performance of an act, and so not part of the *res gestæ*.

Three years ago the United States Supreme Court held that "whenever the intention is of itself a distinct and material fact in a chain of circumstances, it may be proved by contemporaneous oral or written declarations of the party." *Insurance Co. v. Hillmon* (145 U. S. 285). This case has, of course, been of the greatest value in clearing up the law of a still developing subject and ridding it of the unwholesome influence of the *res gestæ* doctrine. It would seem however — if one may judge from the recent decision in Indiana — that that doctrine still succeeds now and then in elbowing its way to the front and involving a stray case in confusion.

CONSENT IN LARCENY. — The question, what constitutes consent in larceny, has again been passed upon in Great Britain. The answer has been in the air since the cases of *Reg. v. Ashwell*, 16 Q. B. D. 190 (1885), and *Reg. v. Flowers*, 16 Q. B. D. 643 (1886). In the first of these cases B. gave A. a sovereign, both supposing it a shilling. When A. discovered the mistake, he kept the money, was convicted of larceny, and by an evenly divided court, this conviction was affirmed. Less than three months later the same court, on substantially the same facts, unanimously quashed a similar conviction in *Reg. v. Flowers*. These decisions were reviewed in a discussion of Consent in the Criminal Law, by Prof. J. H. Beale, Jr., 8 Harvard Law Review, 317, and have elsewhere excited considerable controversy; so that the recent case of *Reg. v. Hehir*, 29 Ir. L. T. 323, which settles the law for Ireland, is of no little interest. A £10 note was mistaken for a £1 one under circumstances similar to those of *Reg. v. Ashwell*, and by a vote of five to four the latter case was expressly disregarded, and a conviction quashed. This decision, coupled with *Reg. v. Flowers*, which, however, assumed to distinguish *Reg. v. Ashwell*, renders it very doubtful whether *Reg. v. Ashwell* would be followed even in England. The Irish court certainly seems to do less violence to any logical theory of consent.

INTERSTATE COMMERCE AGAIN. — The vexed topic of interstate commerce control has cropped up again. In both *Swift v. P. & R. R. Co.*, 64 Fed. Rep. 59, per Grosscup, J., and in *Gatton v. C., R. I. & P. R. Co.*, 63 N. W. Rep. 589, per Kinne, J., it is held that in the absence of legislation by Congress, excessive charges paid for carriages of goods from one State to another cannot be recovered by the shipper. The plaintiff's right to recover depended on the existence of a State common law controlling interstate commerce, or of a federal common law. The existence of either was denied. Such a doctrine would seem to mean that in the absence of legislation by Congress our courts are powerless to enforce the common-law liabilities of interstate carriers, and must leave the public at their mercy, for it appears to follow logically, as was pointed out by Shiras, J., in *Murray v. C. & N. W. R. Co.*, 62 Fed. Rep. 24, 37, that it is "open to all common carriers engaged in interstate commerce to act as they please in regard to accepting or refusing freights, in regard to the prices which they may charge, the care they shall exercise, and the speed with which they shall transport and deliver the property placed in their charge." [See also 7 Harvard Law Review, 488, and 8 Harvard Law Review, 168.] The shippers have only the right to enforce contracts, and even in regard to making contracts, the interstate carriers are absolved from the common-law restrictions governing the contracts of common carriers.

It is not disputed that before the adoption of the Constitution the various States could enforce the common-law liabilities and duties of carriers engaged in interstate commerce. The moot point is the effect of the adoption. The view necessarily involved in the cases under discussion is that the control of interstate commerce by State common law was destroyed, and accordingly that until some Act of Congress no tribunal could enforce the common-law liabilities of interstate carriers. On the other hand, it has been held that the Constitution adopted a federal common law, which took the place of State common law on questions of interstate commerce, and was supreme until in turn superseded by Act



of Congress. As to the existence of a federal common law, however, authorities are as widely at variance as ever. The adherents of its existence from Du Ponceau down are at least equally matched by its opponents [see authorities collected in 63 N. W. R. 589, *supra*]. If, then, the existence of a federal common law is not firmly enough established to afford escape from the results of the doctrines of the principal cases, escape may still be found in controverting the view that the power to control interstate commerce, which was reserved to Congress by the Constitution, excludes, even before legislation, the State common law on the subject. There is a possibility that this contention may prevail.

The exclusiveness of the power of Congress to control depends, according to the test given in *Cooley v. Wardens*, 12 How. 299, on whether the nature of the matters to be controlled makes necessary a uniform rule throughout the States. Accordingly States may pass bankruptcy laws in the silence of Congress on the subject; but not statutes controlling interstate commerce [ *Wabash Ry. Co. v. Illinois*, 118 U.S. 557 ]. The above test, at first thought final and confidently applied, has been more recently questioned, and the tendency of the United States Supreme Court is toward a greater hesitancy to discover the necessity of a uniform rule [ 2 Thayer's Cases on Const. Law, 2190, note ]. In fact, though the last decided cases on the point are hostile to any control by the states of interstate commerce in the absence of congressional legislation, it would not be suprising to see the law circle back to the position taken by Matthews, J., in the case of *Smith v. Alabama*, 124 U.S. 465. He stated that the duties and liabilities of interstate carriers, before Act of Congress, are enforceable only under State common law, and "the failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law." Certainly, the last word on this confused subject is far from said.

## RECENT CASES.

AGENCY—INSURANCE POLICY ISSUED BY INTERESTED PARTY.—Defendant company's agent, who issued an insurance policy to the plaintiff corporation, was a stockholder and officer in that corporation. On that ground defendant company refused to pay plaintiff corporation's loss for the recovery of which this action is brought. *Held*, that the defendant company is justified in his refusal to be bound by the policy. *Greenwood Ice & Coal Co. v. Georgia Home Ins. Co.*, 17 So. Rep. 83 (Miss.).

This decision seems clearly right and in accord with authority. *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N.Y. 85. The agent for the one party appears from the statement of facts to have been in effect the agent of the other also, and this relation of parties cannot exist, owing to the antagonistic interests represented. The exception made in the case of auctioneer's clerks does not apply here, as in that case the clerk is agent for a simple ministerial purpose, and it is a custom well understood by all parties concerned. In general, an agent for one party cannot act in the same transaction for the other party, and in such a case the contract is voidable. 1 Biddle on Insurance, § 497.

BANKS AND BANKING—INSOLVENCY OF COLLECTING BANK—TRUST FUNDS.—A bank received a note for collection and remittance, but, instead of remitting, credited its correspondent with the proceeds, and three days later failed. At the time of failure the cash on hand was less than the amount collected, but the receiver realized from the assets enough to pay all preferred claims. *Held*, plaintiff has a lien on cash on hand

at time of failure, but cannot come in as preferred creditor with respect to the amount since realized from the assets by the receiver. *Boone County Nat. Bank v. Laimier et al.*, 67 Fed. Rep. 27.

It is now pretty well settled that where trust property has been confused with other property of the same kind the equity is not destroyed, but converted into a charge upon the entire mass, giving the *cestui que trust* a prior right over other creditors. *Leters v. Bain*, 133 U. S. 693. But here the assets realized on by the receiver were not, in part or in whole, the product of the converted money, and the principle just stated has never been extended to allowing a priority against funds other than those with which the trust money was mixed. The case is clearly right on both points.

**BILLS AND NOTES — NEGOTIABILITY.** — A promissory note contained an agreement that if there should be any depreciation, before the maturity of the note, in collateral deposited to secure its payment, the payee or holder might call for further security, and if it were not furnished within two days, might sell the collateral and apply the proceeds towards extinguishing the note. *Held*, non-negotiable. There might be a payment of an uncertain sum before maturity, thus rendering the amount payable at maturity somewhat less than the amount specified on the face of the paper. *Lincoln Nat. Bank v. Perry*, 66 Fed. Rep. 887.

This decision is based on the principle that a note for an uncertain amount is non-negotiable. But, it is submitted, there is no uncertainty here as to amount; a definite sum, \$5000, must be paid, and the only uncertainty is as to the time of payment, the holder having an option under certain circumstances to force payment of the whole or part before maturity. This option should not be held to destroy the negotiability of the note. The time of payment must certainly come, and an option in the maker to pay, or in the holder to enforce payment, before maturity, does not affect the negotiability of notes. *Jordan v. Tate*, 19 Ohio St. 586.

**CONSTITUTIONAL LAW — BAR OF STATUTE OF LIMITATIONS — VESTED RIGHT.** — A school district issued bonds that were declared void after the statute of limitations had run against the recovery of the original consideration. The Illinois Legislature passed an act giving holders of such bonds one year in which to sue for the recovery of their money. It was objected that this was a taking of property without due process of law within the meaning of the prohibition in the State constitution. *Held*, that the right to set up the bar of the statute of limitations as a defence to a debt was a vested right, and could not be suspended by the legislature. *Board of Education v. Blodgett*, 40 N. E. Rep. 1025 (Ill.).

The authorities are practically unanimous that a title to property acquired by the statute is a vested right. *Cooley*, Const. Lim. (6th ed.) 448. In regard to the right to plead the statute as a defence to a debt, the great authority of the United States Supreme Court is against it. *Campbell v. Holt*, 115 U. S. 620, 6 Supr. Ct. 209. So in Texas and Alabama. *Bentwick v. Franklin*, 38 Tex. 458; *Jones v. Jones*, 18 Ala. 248. But in eighteen other American jurisdictions where the question has arisen a contrary result has been reached, as shown by the cases cited by the Illinois Court. It is a question scarcely to be argued according to any principle, and the present case follows the overwhelming weight of authority.

**CONSTITUTIONAL LAW — VALIDITY OF A PARTLY UNCONSTITUTIONAL STATUTE.** — *Held*, that where one entire scheme of taxation is provided for in certain sections of an act, so that to declare part of the tax unconstitutional, would leave in operation a tax which Congress would never have intended to stand alone, all the sections are invalid. *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. Rep. 912, 920.

The principle recognized in this "income tax" decision has long been well established; but the notoriety of the case due to the importance of the interests at stake, and the exceptional features that attended its course to a final decision in the Supreme Court of the United States, will probably make it a leading authority on the point. See 9 HARVARD LAW REVIEW, 198.

**CONTRACTS — CERTIFICATE OF ARCHITECT.** — *Held*, that, notwithstanding the stipulation in a building contract that prior to payment the architect's certificate must be obtained, the builders are entitled to the balance due on their account, although no certificate is obtained, the unsatisfied claims of sub-contractors being the only objection to granting certificate, although same had been provided for by builders to be paid out of the amount due. *Mahoney et al. v. Rector, etc. of St. Paul's Church*, 17 So. Rep. 484 (La.).

Such a stipulation as we find in a contract of this kind is an express condition, which the English courts enforce with logical rigor. The present case illustrates the general American rule, which is based on equitable grounds and followed in the different States, with varying degrees of leniency. The court here pronounces the objection



of the architect purely technical, unreasonable, and possibly the result of undue influence on the part of the defendant, although it does not deem the fact of collusion essential to its decision.

CONTRACTS — CONSIDERATION — SUCCESSIVE PROMISES OF SAME PERFORMANCE. *Held*, (1) the promise of a party to a contract to do, or the doing of, that which he is already bound to do, is not a good consideration for the promise of the other party to pay an additional sum; (2) a rescission of the former contract will not be inferred except where the party to whom the promise of an additional sum is made, has refused to perform because of difficulties in the way of performance not anticipated by the parties when the original contract was made; the difficulties encountered need not be such as to furnish a legal defence for non-performance. *King v. Ry. Co.*, 63 N. W. Rep. 1105 (Minn.).

The holding on the first point is thoroughly sound. *Bryant v. Lord*, 19 Minn. 396 at 404 *contra*. On the second point American courts have generally inferred a rescission of the original contract, from defendant's act in entering into the second agreement. The Minnesota Court refuses to make this inference of a rescission from the mere existence of the second agreement, except in a very narrow class of cases. Not even in this narrow class of cases, as it seems to us, does the defendant's part in making the second agreement indicate that he at any time intended to forego his right to require performance under the original contract. See 8 HARVARD LAW REVIEW, 27.

CONTRACTS — PARTNERSHIP — NOVATION. — A., B. and C. were partners and indebted to plaintiff. A. and B. bought out C., and as part of consideration agreed to assume debt to plaintiff. Plaintiff sued A. and B. for this debt, alleging in his declaration a request for the money and a refusal. Defendants demurred on ground of no privity of contract. *Held*, that while novation could only exist by consent of all the parties interested, yet plaintiff's assent was sufficiently shown by the alleged demand on the new firm and the institution of suit, which would operate as an estoppel of any claim against the old firm. *Tyson v. Somerville*, 17 So. Rep. 567 (Fla.).

While the question of whether there was a novation or not is properly for the jury, *Harris v. Farwell*, 15 Beav. 31; *Backus v. Fobes*, 20 N. Y. 204; yet when a new firm assumes the debts of its predecessor, slight circumstances will support the inference of the creditor's assent. *Shaw v. McGregory*, 105 Mass. 96; *Ex parte Williams*, Buck. 13. A demand on the new firm, followed by suit therefor, seems abundant evidence of assent, and the above decision quite right.

CONTRACTS — VALIDITY — CONSIDERATION. — The plaintiff was under an engagement to marry her present husband, when the defendant offered to pay her an annuity, provided the marriage took place within three months. *Held*, on the authority of *Shadwell v. Shadwell*, 9 C. B. N. s. 159, that with the satisfaction of the terms of the offer, a valid contract arose. *Skeete v. Silberberg*, 11 *The Times Law Rep.* 491 (Q. B. Div., Wills, J.).

Although already bound by her engagement to perform a portion of the defendant's proviso, the plaintiff was under no obligation to marry before a reasonable time had elapsed, so that a marriage within three months leaves no difficulty regarding a detriment to the plaintiff in this case. Whether that detriment was suffered at the request of the defendant, whether compliance with his proviso is the thing in exchange for which his promise was given, or merely a condition to his gift, is the real point at issue. The truth should be gathered from all the circumstances, benefit to the promisor being well nigh determinative. The English Court, however, passes lightly over such debatable ground, merely recognizing as stronger than this the case of *Shadwell v. Shadwell*.

CRIMINAL LAW — HOMICIDE IN SELF-DEFENCE — DUTY TO RETREAT. — *Held*, that in case of felonious assault where assailant is killed, it is error to charge that if prisoner could have retreated safely, he should have done so. *Beard v. United States*, 15 U. S. Sup. Ct. Rep. 962. See NOTES.

CRIMINAL LAW — LARCENY — CONSENT. — One Leech gave the prisoner a £ 10 note, both supposing it at the time to be a £ 1 note. A substantial period of time after this, the prisoner discovered the mistake and appropriated the whole of the note. *Held*, by five judges to four, that the prisoner was not guilty of larceny, as the taking was with the consent of Leech. *Reg. v. Hehir*, 29 Ir. L. T. 323. See NOTES.

CRIMINAL PROCEDURE — EFFECT OF ERRONEOUS SENTENCE. — Defendant was tried and convicted of a criminal offence, for which the District Court imposed a sentence different from that authorized by law. Defendant brought writ of error to the United States Circuit Court, where the judgment was reversed and the cause remanded. On objection to District Court's further jurisdiction in the matter, it was *held* that the

Court had power to resentence the prisoner notwithstanding that part of the void sentence had been executed. *United States v. Harmon*, 68 Fed. Rep. 472.

The effect at common law of the reversal of an erroneous sentence is a question upon which authorities have divided very evenly. The earlier and more orthodox view was that it discharged the prisoner completely. *Bourne v. Rex*, 7 A. & E. 58, 2, Nev. & P. 248; *Sumner v. Commonwealth*, 3 Cush. (57 Mass.) 521; *McDonald v. State*, 49 Md. 90; *Elliott v. People*, 13 Mich. 365; *Howell v. State*, 1 Or. 241; *State v. Child*, 42 Kan. 611; *People v. Taylor*, 3 Den. (N. Y.) 91. In England, Massachusetts, and New York this has now been changed by statute to correspond with the view of the principal case, which is also the common law ruling of *Kelly v. State*, 11 Miss. 518; *Terr v. Conrad*, 1 Dak. 363; *Beale v. Comm.* 25 Pa. 11; *People v. Riley*, 48 Cal. 549; *State v. Shaw*, 23 Iowa, 316; *Brown v. State*, 13 Ark. 96; *State v. Nicholson*, 14 La. 785. See also *Re Bonner*, 151 U. S. 242, 14 Sup. Ct. 323, controlling the principal case. The present tendency toward disregarding legal technicalities is likely to make courts prefer the latter opinion where the point is yet open.

**DAMAGES—EXEMPLARY ALLOWED IN CIVIL ACTIONS.**—Defendant is sued in tort under a statute allowing suit by a wife for the wrongful sale of liquor to her husband. *Held*, exemplary damages should be awarded. *Mayer v. Frobe*, 22 S. E. Rep. 58 (W. Va.).

This decision overrules the cases of *Pegram v. Stortz*, 31 W. Va. 220, and *Beck v. Thompson*, 31 W. Va. 459, in so far as they hold that exemplary damages in a proper case, cannot be inflicted by way of punishment in a civil suit upon a wrongdoer, and places West Virginia among the list of States which allow exemplary damages.

**DAMAGES—UNLAWFUL EXPULSION OF PASSENGER.**—Plaintiff was evicted from a car because he would not pay his fare instead of his ticket, which the conductor thought bad. Plaintiff resisted. The ticket proved good, and plaintiff now sues the company and claims to recover damages for a nervous disorder brought on because of the force used by the conductor in overcoming plaintiff's resistance. *Held*, that plaintiff can recover damages for the injury, though caused by his resistance, because he rightly resisted. *Pittsburgh C., C. & St. L. Ry. Co. v. Russ*, 67 Fed. Rep. 662.

This decision rendered by the Circuit Court for the District of Indiana is manifestly fair, provided the plaintiff does not resist a wrongful expulsion for the express purpose of increasing the amount of damages. The conductor committed a trespass in putting him off the train. If the plaintiff resists too much, then the conductor may have an action for assault against him, but plaintiff's action will still remain, and the conductor be responsible for all natural consequences. In the case at bar no such unreasonable resistance was made, and the injury to the plaintiff was, as resistance was rightful, the natural consequence of the conductor's act. 2 Sedgwick on Damages, 865.

**EQUITY—PARTNERSHIP—RIGHTS OF CREDITORS.**—X, one of the partnership creditors, held a mortgage security for the payment of his claim, executed by one member of the firm and his wife on the property of the latter, who was in no way connected with or responsible for the partnership debts other than by the execution of this mortgage. *Held*, that X could not be compelled to first resort to his mortgage security and thus leave the partnership assets to the other creditors. *State Bank of Florida v. Roche et al.*, 17 S. E. Rep. 652 (Fla.).

It is a well established rule in Equity that where one creditor holds security on two funds, with liberty to resort to either, and another creditor has a junior security on only one of the funds, the former will be compelled to exhaust the fund which he alone can reach before resorting to the other fund. *Cheesborough v. Millard*, 1 Johns Ch. 409. In the principal case the court limits the rule and refuses to apply it where the effect would be to prejudice the rights of a third party. This limitation is an equitable one and supported by authority. *McClaskey v. O'Brien*, 16 W. Va. 791; *McArthur v. Martin*, 23 Minn. 74; *Aldrich v. Cooper*, 2 W. and T. Leading Cases in Equity, 82.

**EVIDENCE—DECLARATIONS OF INTENTION—RES GESTA.**—In an action for breach of contract of marriage, the plaintiff's intention, as showing consent on her part to the contract, was material. She offered evidence of a statement by her, that she was going to be married in October. *Held*, that it was not admissible because not part of the *res gesta*. *Wilson v. Smelser*, 41 N. F. Rep. 76 (Ind.). See NOTES.

**EVIDENCE—PHYSICIAN'S TESTIMONY.**—Defendant-in-error told his physician that at the time of his injury he was leaning over the edge of a car-top. *Held*, that physician might give the statement in evidence, for it was not a communication made by a patient with reference to any physical disease nor knowledge obtained by a personal examination of the patient, and as such privileged by the Kansas Code. *Kansas City, etc., R. R. Co. v. Murray*, 40 Pac. Rep. 646 (Kan.).



Communications are variously protected by statutes in the different States; but in any case, the courts are not disposed to protect communications unsuited to aid the physician in treating the patient. In the case of *Cooley v. Iotz*, 85 Mich. 47, a physician was allowed to testify that the plaintiff, on employing him, told him that she should need him as a witness. In N. Y., too, where the tendency of the courts has been to construe the privilege broadly as covering all communications to physicians made in the course of professional treatment, the case of *Hoyt v. Hoyt*, 112 N. Y. 493, 515, per Gray, J., points towards the more general doctrine. In that case, the testator's opinion of plaintiff's sanity communicated to his attending physician, was admitted in evidence.

**EVIDENCE—PHYSICIAN'S TESTIMONY.**—A physician who had treated the defendant, testified that the defendant told him that a piece of a nail had come out of his knee. No question of privilege of communications to a physician was involved. *Held*, that the evidence was hearsay and inadmissible. *B. & A. R. Co. v. O'Reilly*, 15 Sup. Ct. Rep. 830.

The decision is undoubtedly correct; but the case is to be sharply distinguished from those cases in which it is sought to introduce a patient's statements to his physician, not as evidence of the facts stated, but as evidence of the grounds on which the physician bases his opinion of the patient's condition. There is authority for admitting such statements for the latter purpose. *Barber v. Merriam*, 11 Allen, 322.

**EVIDENCE—PRESUMPTION OF FAULT.**—*Held*, that where one vessel is clearly shown guilty of a fault adequate to account for a collision, there is a presumption raised that the other vessel is free from contributing fault until rebutted by clear proof to the contrary. *The Oregon*, 15 Sup. Ct. Rep. 804.

The presumption laid down here is not new; it is stated in substantially the same way in 1 Parsons on Shipping and Admiralty, 529, in 5 How. 441, 465, and in Olcott Adm. 132, 138. The striking feature about the presumption—one not expressly noticed in the earlier cases—is the amount of evidence necessary to overcome it. It is not enough for the vessel whose fault is sufficient to account for the collision "to raise a doubt with regard to the management of the other vessel . . . and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." *The City of New York*, 147 U. S. 72, 85. The weight of the presumption entitles it to rank with the familiar presumptions of innocence and legitimacy.

**EVIDENCE—SHOP-BOOKS—ORIGINAL ENTRIES.**—Where a shop-keeper enters sales of goods on loose slips of paper, which items are transferred in the evening to a ledger, if these items consist merely of a general charge of merchandise and the amount for which it sold, *held*, such a ledger is inadmissible as a book of original entries. *Way et al. v. Cross et al.*, 63 N. W. Rep. 691 (Iowa).

The Court appears to lay down a narrower rule than is held in many jurisdictions. It would not generally be held fatal to the admission of a shop-book that the entries did not specify the kind of goods purchased. A shop-book has been held admissible in Massachusetts, although the item for which it was put in contained neither measure, weight, nor quantity. *Pratt v. White*, 132 Mass. 477. Books which contain nothing more than marks or figures have been held admissible if other evidence is forthcoming which can explain these and show their connection with the main transaction. *Miller v. Shay*, 145 Mass. 162. The fact that the book offered in evidence is kept in ledger form, and that the entries have been posted each evening from memoranda made elsewhere during the day, has been also held not to bar its admissibility. *Faxon v. Hollis*, 13 Mass. 42.

**INTERSTATE COMMERCE—STATE CONTROL.**—Where a carrier has received excessive rates for carriage of goods from one State to another under a contract made before the enactment of the Interstate Commerce Law, *held*, that he cannot be compelled to refund the excess over a reasonable charge. *Gatton v. C., R. I. & P. R. Co.*, 63 N. W. Rep. 589 (Iowa). See NOTES.

**PERSONS—DIVORCE—CRUELTY.**—Petition by the husband for divorce, on the ground of extreme cruelty, the wife having repeatedly accused him both in public and private of having committed sodomy. *Held*, that to constitute legal cruelty there must be a reasonable apprehension of danger, present or proximate, to life, limb, or health (Rigby, L. J., dissenting). *Russell v. Russell*, 11 *The Times Law Rep.* 579. (Court of Appeal).

The above doctrine of legal cruelty was approved in *Evans v. Evans*, 1 Hag. Con. 38 (1790), and has been closely followed ever since by the English Courts, the Courts having "always been jealous of the inconvenience of departing from it." Justice

Rigby's dissenting opinion is a strong argument for a relaxation of the doctrine, on the ground that a series of verbal indignities are capable of amounting to legal cruelty, independently of violence. In United States many of the courts have broken away from the physical injury test, and have granted relief in cases where there was no actual violence, by a more liberal interpretation of legal "cruelty." *Rosenfeld v. Rosenfeld*, 40 Pac. Rep. 49 (Col.) (Mere words); *Barnes v. Barnes*, 95 Cal. 171 (Facts almost identical with principal case); *Straus v. Straus*, 67 Hun, 491; *Palmer v. Palmer*, 45 Mich. 150; *Scolind v. Scoland*, 4 Wash. 118. See also *Robinson v. Robinson*, 66 N. H. 600, for a very able review of the subject by Judge Carpenter.

**PERSONS — MARRIAGE OF SLAVES — EFFECT OF EMANCIPATION.** — Plaintiff and one Henrietta Coleman, while slaves, began living together as husband and wife, a valid marriage being prohibited to them. After emancipation, they continued to cohabit until the death of the wife in 1894, but no legal marriage ceremony was ever performed. Before Henrietta's death she conveyed to defendant certain property, in executing the deeds of which plaintiff had not joined. He sued to recover this property. *Held*, plaintiff and his wife by continuing to cohabit after emancipation ratified the marriage relation, of which they were before legally incapable, and thus established a valid marriage between themselves. The wife was then incapable of conveying real estate alone. *Coleman v. Vollmer*, 31 S. W. Rep. 413 (Tex.).

This decision is in strict accordance with the opinion of Mr. Bishop (1 Bishop, Mar., Div., and Sep., §§ 660-669), who thinks that a slave marriage, being deemed good by custom so far as it did not conflict with the master's rights, could be affirmed or disaffirmed by the parties without further formality when emancipated. North Carolina is the only State in which a different view has been upheld. *Howard v. Howard*, 6 Jones, 235.

**PROPERTY — ACCRETIONS — DEMURRER UPON EVIDENCE.** — Plaintiff's land was a government patent bordering on the Missouri River. The river gradually changed its course until the main channel flowed over what had once been the plaintiff's land. An island then formed within the original limits of the patent. *Held*, on demurrer upon evidence that plaintiff had no title to the island. (Brace, C. J., dissenting.) *Cox v. Arnold*, 31 S. W. Rep. 592 (Mo.).

This seemingly harsh case finds its explanation in the rule that in the large western rivers the fee in the bed belongs to the State, and that adjacent land granted by the United States is bounded by the bank of the river. As all gradual accretions to the bank would accrue to the benefit of the riparian owner, he must take the opposite risk and yield to the State the fee of land gradually submerged. An island formed over this new bed would come within the general rule as to islands in navigable western streams, and would go to the State. *Gould on Waters*, §§ 42, 76.

**PROPERTY — BOUNDARIES — COURSES AND DISTANCES.** — The decision in an action of ejectment depended on the construction of a deed granting 10,240 acres, describing the boundaries as follows: "Beginning at a birch-tree and running south 360 chains to a stake supposed to be in D's line, and thence . . ." If the line was run south 360 chains, it would still be one mile and a quarter from D's line, where the stake was supposed to be. *Held*, the line should not be extended, but stop at a distance of 360 chains from the birch-tree. *Brown v. House*, 21 S. E. Rep. 938 (N. C.).

The decision seems sound. The court admits that natural objects or monuments govern courses and distances as a general rule, but say that the reason of the rule fails to apply here as the monument, "a stake supposed to be in D's line," is too indefinite, and would call for too great an extension of the line from the birch-tree. They also give weight to the fact that the area will be much nearer 10,240 acres if the course and distance govern. This is an argument for allowing course and distance to prevail, especially where the boundaries are as doubtful as in the case at bar. 3 Gray's Cases on Prop., 285, *et seq.*

**PROPERTY — EMINENT DOMAIN — PUBLIC USE.** — Plaintiff railway company sought to condemn, for its proposed road-bed, an unused portion of defendant railroad company's right of way. The proposed railroad, when built, would be used mainly by a few mine-owners, and but little by the public in general. From a judgment below, in favor of plaintiff, defendant appeals. *Held*, under the Constitution, Art. 15, § 5, the proposed road would be a public carrier, and the public would, therefore, have a right to use its facilities; the character of a road, whether public or private, is to be determined by the extent of the right to use it, and not by the extent to which that right will be exercised. *B., A. & P. Ry. Co. v. Montana Union Ry. Co.*, 41 Pac. Rep. 232 (Montana).

The point here decided is well established. *Randolph on Eminent Domain*, § 56; *Lewis on Eminent Domain*, § 171. The opinion contains a rather interesting discus-



sion — unnecessary for the decision of the case at bar — as to the interpretation of the term public use in connection with the law of Eminent Domain.

PROPERTY — INNKEEPER'S LIEN — GOODS OF THIRD PARTY. — *Held*, that an innkeeper has a lien on all the baggage of a guest which he is bound to take in, even where he has notice that it is not the property of the guest. *Robins & Co. v. Gray*, 11 *The Times*, Law Rep. 569. See NOTES.

SALES — RETENTION OF POSSESSION BY VENDOR. — Plaintiff, an indorser on a note made by a shoe company, bought from the company a lot of goods in return for a promise to assume the note. The company was allowed to keep possession of the goods; later it became insolvent. Plaintiff recovered in detinue against the assignee. The lower court sat without a jury, and the upper court affirmed the judgment. *King v. Levy*, 22 S. E. Rep. 492 (Va.).

Here is another refreshing stand against the doctrine that retention of possession by the vendor is fraud in law. The doctrine, however, has a hold in over one-third of the American jurisdictions. See Bennett's note in Benjamin on Sales, 6th ed., 458.

TORTS — DEATH BY WRONGFUL ACT — SURVIVAL OF ACTIONS. — *Held*, an administrator cannot maintain two actions for negligence resulting in death, — one as trustee for next of kin of deceased under Lord Campbell's Act, and another for damage to the person of deceased under a statute for the survival of actions. *Lubrano v. Atlantic Mills*, 32 Atl. Rep. 205 (R. I.).

In general a person may sue in different capacities to obtain redress for the same wrongful act. Freeman on Judgments, § 235 *a*, Black on Judgments, §§ 536, 745. The construction of the act for survival, that it is intended to embrace only damages to the person other than those which result in death, and that it was not intended to give a remedy additional to Lord Campbell's Act, has been the construction commonly given to similar statutes in other States. See cases cited in the opinion. In Massachusetts, however, both actions may be maintained. *Bowes v. City of Boston*, 155 Mass. 344.

TORTS — DECEIT — HONEST INTENTIONS. — Defendant wrote a letter which would be reasonably understood to warrant a certain title unencumbered. Plaintiff sustained loss by relying upon this interpretation of the letter. *Held*, that defendant might prove in defence that its letter was intended to convey a different meaning. *Nash v. Minnesota Title Insurance and Trust Co.*, 40 N. E. Rep. 1039 (Mass.). See NOTES.

TORTS — LEGAL DUTIES. — *Held*, that in an action against a railroad company for an injury received through negligence an action of tort lies, whether a contract exist or not, or whether it be negligence of commission or omission. *Kelly v. Railway*, [1895] 1 Q. B. 944. See NOTES.

TORTS — NEGLIGENCE — DUTY TO THIRD PARTIES. — Defendant placed an elevator on trial in the building where plaintiff was an employee. Before it was accepted by his employer, and while still under supervision of the defendant, owing to its defective and improper construction, the elevator fell, severely injuring the plaintiff, who was near by. *Held*, that, there being no contractual relation between the parties, nor any invitation by defendant to plaintiff, there was no liability on his part. *Zeeman v. Kieckheffer Elevator Mfg. Co.*, 63 N. W. Rep. 1021 (Wis.).

While the court in this case seems clearly right in denying liability on the grounds of contract or invitation, it seems as clearly wrong in denying liability on other grounds. The defendant in building the elevator owed it as a duty to all persons rightfully in the building that it should be properly and safely erected. This it confessedly was not; to the damage of the plaintiff, for which damage the defendant's breach should render him liable. Recourse need not be had to the extreme doctrine of *Flood Balm Co. v. Cooper*, 83 Ga. 457, to support this decision which seems to follow from the general doctrine of liability for negligent injury.

TRUSTS — BEQUEST — CHARITABLE TRUST. — *Held*, that a bequest of a fund to a yacht-racing association to apply the income to purchase annually a cup "to be presented to the most successful yacht," etc., is void. It is not a charitable trust. *In re Nottage*, *Jones v. Palmer*, 11 *The Times* Law Rep. 519 (Court of Appeal).

The case presents an interesting and novel question. The object of the testator was "to encourage the sport of yacht-racing;" and the court based their decision on the ground that if there was any benefit to the community at large, it was too remote to warrant their establishing the gift as a charitable trust.

TRUSTS — CHARITIES. — *Held*, societies for the suppression of vivisection of animals are charities within the technical sense in which the term charity is used in law. 11 *The Times* Law Rep. 540. (Chan. Div., Chitty, J.)

If these societies had for their object merely the protection of the lower animals, though they might be benevolent, they could hardly be called philanthropic, or charitable. But the court considered that the advancement of morals among men was also involved in their object, and that they were therefore brought within the term charity. So, a Society for the Prevention of Cruelty to Animals, a Home for Lost Dogs, a Society for Protection of Animals liable to Vivisection, ( 35 Ch. D. 472 ), and an institution for studying and curing diseases of beasts and birds useful to man, ( 1 De G. & Jo. 72 ), have been held charitable.

TRUSTS—FRAUDULENT SALE—FOLLOWING PROCEEDS.—Plaintiff was induced by the fraud of B to sell him sugar on credit. B resold on credit and later made an assignment for the benefit of creditors. Plaintiff then, on discovering the fraud, sued B's assignee for the proceeds of the resales. The particular proceeds could be identified. *Held*, plaintiff has an equitable lien on the proceeds. *American Sugar-Refining Co. v. Fancher*, 40 N. E. Rep. 206 ( N. Y.).

The case is interesting as involving a constructive trust of the proceeds of personal property, where the trustee was neither a fiduciary nor a wrongdoer who lacked title *ab initio*. The trust was, however, properly implied because of the fraud, and equity "makes use of the machinery of a trust for the purpose of affording redress in cases of fraud." *Bispham on Equity*, § 91. Given the trust, the proceeds, if identified, can be followed. *Newton v. Porter*, 69 N. Y. 133.

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## REVIEWS.

COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS. By Seymour D. Thompson, LL. D. San Francisco : Bancroft-Whitney Co. 1895. 8vo. 6 vol.

It is unsatisfactory to make comment upon a work of such importance and magnitude as Thompson on Corporations, before the work is given to the public in its completeness ; for any judgment passed on the scope and thoroughness of the treatment of the Law of Corporations, when two of the six volumes have yet to appear, must necessarily lack finality. Therefore it has been deemed best to postpone consideration of this publication until it can be reviewed as a whole. The last volume is announced for publication in November.

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MUNICIPAL HOME RULE. A Study in Administration. By Frank J. Goodnow, A. M., LL. B., Professor of Administrative Law in Columbia College. New York and London : Macmillan & Co. 1895. 8vo. pp. xxiv, 283.

The only objectionable thing about this book is its title, which gives no adequate idea of the nature or value of the contents. The author has given the reader not only a thoughtful treatise on the proper sphere of municipal action, but also an admirable summary of the present state of the law. There is no other book which contains so valuable a statement, in so small a space, of the law on certain elementary points relative to municipal corporations. Chapters VI. to XI. (both inclusive) fully justify the hope modestly expressed in the Preface, that the book may be useful from the legal as well as from the political point of view. These chapters discuss the liability of municipal corporations for torts, and the degree of protection afforded to municipal property by the constitutional provisions respecting private property. This part of the book forms an admirable introduction to what Professor Goodnow aptly terms the "great work" of



Judge Dillon. The conspicuous merit of what may be called "the legal chapters" consists in their clear statement of the various and conflicting theories heretofore acted upon by different courts. The present state of the legal controversy as to these important open questions is depicted here in vivid colors and with a due sense of proportion. While the author does not conceal his individual views, he also gives a fair statement of all the prominent theories and a reference to a sufficient number of illustrative cases. The work cannot fail to be of great service to the legal profession.

J. S.

A MANUAL OF PUBLIC INTERNATIONAL LAW. By Thomas Alfred Walker, M. A., LL. D., Fellow and Lecturer of Peterhouse, Cambridge. New York: Macmillan & Co. 1895. 8vo. pp. xxviii, 244.

HANDBOOK OF INTERNATIONAL LAW. By Captain Edwin F. Glenn, Acting Judge Advocate U. S. A. St. Paul: West Publishing Co. 1895 [Hornbook Series]. 8vo. pp. xix, 478.

International Law is a branch of science ill fitted for manual instruction; one easily sees that, so entirely has it been developed by reasoning and discussion, its study requires headwork and handbooks rather than handbooks. And indeed it has until lately been blessed by an absence of the latter class of literature, — a boon that was not sufficiently realized. But blessings brighten as they take their flight.

Of what use these books (both said to be designed for the use of students) can be to persons who really desire to learn is not quite clear. Dr. Walker intends his book to "serve as a fairly comprehensive general introduction to detailed study of the subject." Captain Glenn suggests that he wishes "to prepare the student's mind for the more ready and complete comprehension" of the exhaustive treatises on the subject. A man who understands the English language, has some knowledge of history, and is sufficiently mature to comprehend the nature of the considerations involved in an international question, is quite qualified to use Wheaton, Calvo, or Hall; one who has not these qualifications could get no help from Dr. Walker or Captain Glenn. As such books must, these handbooks save the readers the burden of struggling with difficulties by the device of stating, as a rule, only what is plain and undisputed. To quote Captain Glenn again, "it is not intended to follow and discuss these principles in their many ramifications of actual practice."

But judging, as we ought, with relation to other books of the same class, one must say that Dr. Walker's book is well done. Originality is of course not to be looked for (as Captain Glenn naively remarks in his Preface), and one should therefore not quarrel with Dr. Walker, as some have done, for following too blindly his English predecessors; though the effect of this course is sometimes a little surprising, when a peculiarly English idea, reduced to lowest terms, is confronted with the real facts.

Thus the English notion of International Law — that it is a mere *précis* of the actual present practice of nations as seen through the spectacles of the British Foreign Office — leads Dr. Walker into the delicious absurdity of the following statements, *à propos* of the partition of Poland: "International Law, it is true, rests upon practice, and accordingly wha ever rules *do* secure the general adhesion of civilized states must by the lawyer be classed as law. But moral injustice *cannot* secure such general adhesion. And accordingly, although interventions under sanction of the European Concert have been fairly frequent, they have been

hitherto based, and must, it would seem, of necessity be based, on the common interest of civilized Powers, and particularly of the Powers of the Concert. Interventions of this order are indeed but measures of high international police"! An equally obscure passage is that upon Naturalization, on page 44.

It is reassuring to find that Dr. Walker does not follow Mr. T. J. Lawrence in the whimsical notion of an aristocracy of great powers in the Old World, and an international monarchy in the New. England, it appears, is not yet prepared to discard the doctrine upon which all international intercourse is built, — that of the equality of independent states. One is also glad to see the free quotation of decided cases, both English and American, in all parts of the subject.

Captain Glenn's book cannot be so highly commended. After disclaiming originality in statement of principles, he tells us that these "have been freely copied from authorities of recognized standing;" and as a mere work of selection and abridgment, chiefly from Hall's treatise, it has been pretty well done. The general arrangement of the subject, also, is good; this is because "the analysis of this subject and selection of cases by Mr. Snow, both of which are excellent, have been freely used." Captain Glenn's Table of Contents is in fact an almost exact copy of Dr. Snow's "Syllabus." Having taken his arrangement and statement of principles from works already published, Captain Glenn has added certain comments and explanations in his own language. These, though sometimes clear and pertinent, can never be said to rise above mediocrity.

This method of book-making is now common, and in this case, being so frankly acknowledged, cannot be called dishonest; but it is none the less an unlicensed use of the labor and the ideas of other men. It is not necessary further to comment on the matter. Captain Glenn's book is hardly calculated to supersede Hall and Snow.

J. H. B.

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HISTORY OF THE LAW OF REAL PROPERTY IN NEW YORK. — An essay introductory to the study of the Revised Statutes. By Robert Ludlow Fowler. New York: Baker, Voorhis & Co. 1895. 8vo. pp. xxxvi, 229.

This book will be welcomed with especial interest by New York law students, for it makes a very readable as well as instructive introduction to the study of the Revised Statutes. Mr. Fowler is not, in the main, a profound writer, but he is always clear, and, at times, entertaining. The reader follows the narrative with ease, whether the subject in hand be the points of difference between the English and the more lenient Dutch law of feudal tenure, the effect upon the feudal system of the Statute 12 Car. II., or the effect upon uses and trusts of the Revised Statutes of New York. Here and there the way is enlivened with a glimpse of political history; but it is only a glimpse, for the author never allows himself to be beguiled more than momentarily from the dusty road of the legal historian. There is a good deal of recondite learning on the nature of a fee-farm in the seventeenth century, a difficult subject, which Mr. Fowler has examined at some length, and on which he dissents with becoming modesty from the decision of the Court of Appeals in *De Lancey v. Piepgras* (138 N. Y. 26).

The book is, however, for the most part an historical, and not a crit-



ical, essay. Thus the famous Revised Statutes of 1829 are well sketched in outline, but there is no comment upon them, except, indeed, in the preface, which has what some readers will think a much too enthusiastic word in their praise.

A. K. G.

THE LAW APPLICABLE TO STRIKES. By Jacob M. Moses, of the Baltimore Bar. Baltimore: King Brothers. 1895. 8vo. pp. 62.

This little work of sixty pages embodies a well-written essay, which the authorities of the University of Maryland deemed worthy of ranking as one of their prize theses. The author, of course, does not pretend to speak the final word on a subject which is still in an embryonic state. He is content with collecting and discussing the many cases that have been decided on the question in recent years, and deducing from them what leading principles he can. The main part of the work falls under the heads of Conspiracy and the Injunction as a Remedy. Speaking of the latter, the author remarks that, as the effect of the recent great strikes, no other subject has been so much discussed in legal circles during the past year, or has called forth so many divergent views. After a considerable discussion, he concludes that, in applying this remedy, our courts have thus far kept well within their proper sphere of jurisdiction.

Perhaps the most interesting portions of the monograph are those which treat of the use of the mandamus in the recent Brooklyn strike, and the action of the Federal Court in the far-famed case of *United States v. Debs*. Mr. Moses has done his work well, and has produced a really valuable summary of a very live topic of the law.

R. G. D.

HANDBOOK OF THE LAW OF SALES. By Francis B. Tiffany. St. Paul: West Publishing Co. 1895. 8vo. pp. viii, 347.

The purpose of the book, to quote the Preface, "is to present concisely the general principles of the law of the sale of personal property." In this the author has succeeded, and his book may be classed among the best of the Hornbook series. His style is well condensed, clear, and readable; his statements, with few noted exceptions, accurate; and a sense of nice discrimination, commendable in a work of so small a compass, pervades the book. An excellent example of this last quality is his treatment of acceptance and receipt under the Statute of Frauds.

The author keeps to the spirit of the Hornbook series, and is content with an intelligent classification of authorities, making little attempt to discuss principles. It is for this reason probably that he lays down without comment the generally accepted rule that no memorandum of a contract exists in the absence of a broker's entry, if the bought and sold notes do not agree. The same reason, it is likely, has led him to the hard and fast rule that the retention of a *jus disponendi* by a shipper who loads goods in pursuance of a contract calling for unspecified goods, prevents title passing to buyer at shipment. The material point in most of the cases cited to support this statement concerns the passing, not of property, but of the right of possession: so that the rule laid down is based mainly on *dicta*. There is no reason in principle, if the indorsee of the bill of lading be protected by the shipper's retention of a vendor's lien, that title should not pass at shipment if such be the intention of the parties. Mr. Tiffany's rule seems to go farther, therefore, than principle or the cases demand. The absence of reference to the case of *Moors v. Wyman*, 146 Mass. 60, is noticeable in this connection.

E. R. C.

**THE ROAD RIGHTS AND LIABILITIES OF WHEELMEN.** By George B. Clementson. Chicago: Callaghan & Co. 1895. 8vo. pp. xxvi, 208.

The primary object of this book is to put the present bicycle law in a shape that will attract the lay reader. The author also hopes that it may be helpful to lawyers in the preparation of their briefs. The very features, however, that recommend it to the general reader—a departure from a condensed legal style and the introduction of matter extraneous to a discussion of questions of law—will somewhat lessen its value for the lawyer who seeks the most concise statement of mooted points. In its primary object, despite a tendency towards repetition, and a noticeable looseness of expression in places, the book should be successful. Its handiness—it is published in convenient pocket size—is greatly in its favor. The existing cases on bicycle law appear to have been well utilized; and little exception can be taken to the writer's correctness of statement. The bicycle, it seems, has come pretty clearly to be regarded, in the eye of the law, as a carriage or other vehicle; but it is to be noted that the standard of care required of a city in the repair of roads is not measured by the bicyclist's needs, so that accidents due to small stones or slight unevennesses are not causes of action. The city is not liable unless the defects threaten the safety of "carriages" in the ordinary sense of that word. To know his duties in detail, a bicyclist should take Mr. Clementson's advice to acquaint himself with the ordinances of the city in which he rides.

E. R. C.

**NEW YORK RAILROAD LAWS.** By George A. Benham, of the Troy Bar. Albany: W. C. Little & Co. pp. xli, 604.

This volume aims to compile the New York laws up to 1894, bearing on the building, management, and operation of railroads, and to furnish a reference manual for the use of lawyers and business men connected with railroads and other corporations. As such, it includes not only the General Railroad Act, but those sections from the laws on Taxation, Receivers, Penal Code, and Codes of Civil and Criminal Procedure, which apply to railroads and to corporations in general. The best features of the book are its careful arrangement and facilities for reference. While, perhaps, chiefly useful because it puts into handy form all New York statutes bearing on railroads, it is of value also for the citation of cases and occasional notes of decisions on those laws. The scope of the work is not confined to New York law alone, but has elements which may recommend it to the profession at large.

H. C. L.

**AMERICAN ELECTRICAL CASES,** with annotations. Edited by William W. Morrill. Albany: Matthew Bender. 1895. Vol. III. 1889-1892. 8vo. pp. xxi, 893.

The third volume of this series, which aims to collect the cases on electricity, brings the work down to 1892. It follows in all respects the plan of the first two volumes noticed in 9 HARVARD LAW REVIEW, 166, and like them is well arranged and carefully prepared. The large number of cases—nearly twenty-five per cent of the whole—in which electric railways are concerned, is, as the editor says, worth remarking, when it is remembered how recently such railways had come into general use at the time the cases arose.

A. K. G.



OUTLINES OF TRIAL PROCEDURE. By J. L. Bennett, of the Chicago Bar.  
Chicago: Donohue & Henneberry. 1895. 12mo. pp. 55.

In his preface, Mr. Bennett quotes from Thompson on Trials to the effect that the subject of trial procedure is vast enough to embrace the whole field of legal learning. His object, he explains, is to deal with its leading principles in as brief a space as possible, and this task he accomplishes in less than fifty pages. As a result of such vigorous condensation, the work is necessarily somewhat dogmatic and rather elementary in character; but that suggestiveness which the author aimed at has certainly been to a considerable degree attained. Though intended primarily for use in Illinois, the book will probably be found of value elsewhere.

R. G. D.

OUTLINE OF THE INFRINGEMENT OF PATENTS. By Thos. B. Hall. New York and Albany: Banks Brothers. 1895. pp. vi, 86.

In the main this book is founded upon two larger works on patents and their infringement, previously published by the same author, both of which have been praised by the members of the Supreme Court. It is based solely upon the opinions of the U. S. Supreme Court, giving an outline of the decisions of this body upon patent licenses, the identity of inventions, the validity of patents, and damages for infringement. Cases illustrating the development of the principles laid down in the body of the work are collected in chronological order at the end of the book which must prove very useful as a handy reference manual for the patent lawyer.

J. P. H.

TABLE OF PUBLIC GENERAL ACTS IN FORCE. By Paul Strickland.  
London: Wm. Clowes and Sons, Limited. 1895. pp. 82.

The compiler has collected in chronological order all the English statutes passed by Parliament and now in force in any part of the British Empire. Partial repeal or alteration is indicated, as well as the subject-matter and part of the empire to which each statute is applicable. It is noteworthy that one-half of all the acts mentioned have been passed since 1860, and five-sevenths during the reign of Victoria. In all, over 4,000 are tabulated.

J. P. H.

NEW YORK STATE LIBRARY BULLETIN: Subject Index of Law Additions.  
By Librarian Stephen B. Griswold. Albany: University of the State of New York. 1894. pp. 207 to 509.

Another eloquent testimonial to the increasingly rapid accumulation of legal literature is this supplement to the index of the New York State Law Library. It includes 12,000 volumes added to the library between 1883 and 1893, alphabetically arranged, with cross-references, in a form convenient for consultation.

J. P. H.

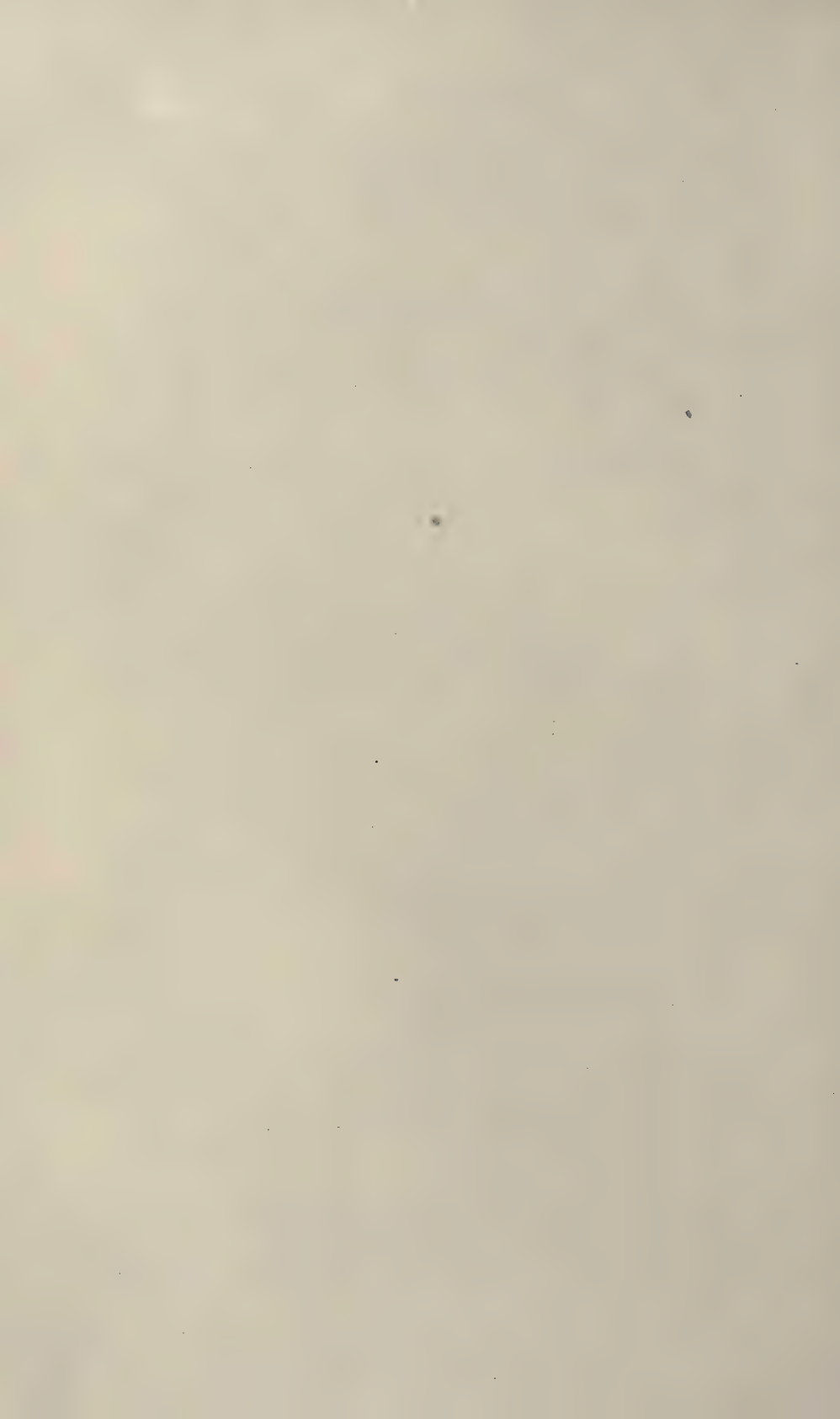
VITAL STATISTICS OF THE NEW ENGLAND STATES. Compiled by State Boards of Health. Boston: Damrell & Upham. 1895. pp. 59.

This little pamphlet gives in tabulated form the statistics of the six New England States in regard to marriages, divorces, births, and deaths

for the year 1892, and compares them with the same kind of data from other countries, and for preceding periods of time. Among other interesting facts the curious circumstance is revealed that while the marriage rate in New England is the highest in the world, the birth rate is almost the lowest record in any country.

J. P. H.





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## CONSIDERATIONS MOVING FROM THIRD PERSONS.

IN most actions upon contracts, the consideration "moved" directly from the plaintiff to the defendant, either by way of a benefit conferred or a loss sustained, or both, and the promise sued upon was made by the defendant directly to the plaintiff.

But occasionally the whole consideration arises between the defendant and some third person other than the plaintiff, and the promise is made to such person alone ; and the question arises, Can any other person than the promisee maintain an action upon such promise, solely because he is beneficially interested in its performance ? Many cases seem to hold that he can. Is that a universal, or even a general rule ? Is not the general rule the other way ? If A. sends a present to B. by an express-man and pays him double price upon his promise to deliver the article promptly, can B. recover damages for the carrier's non-performance of that contract ?

A perfect, well rounded contract requires not only a promise and a consideration, but a participation by each party in both of these elements. Possibly a privity as to only one might not always be fatal, though even this is doubtful ; but a want of privity as to both the promise and the consideration certainly seems to be an insuperable obstacle to an action, upon the strict principles of the common law. If no other reason existed, the fact that the person who furnished the consideration, and to whom the promise was made, could always maintain an action upon it, seems to be a suffi-



cient reason why another person could not, even though interested in the performance. To allow two actions by two disconnected persons, having opposite interests, upon the same promise, would indeed be anomalous.<sup>1</sup>

That a plaintiff cannot maintain an action when the whole consideration moves from a third person to the defendant, and the defendant's promise is made wholly to such third person, has been the law of England for over two centuries.<sup>2</sup>

A marked illustration of this principle occurred in the recent case of *Tweddle v. Atkinson*,<sup>3</sup> in which two fathers, whose children had intermarried, promised each other to pay a certain sum to the son as a marriage portion. One of them failed to pay according to the agreement, and it was held that the son could not maintain an action for the amount, notwithstanding the relationship between the promisee and the son, and notwithstanding the contract itself stipulated that the son might do so.<sup>4</sup>

In America also the same general principle has been often adopted. This subject was carefully examined in *Exchange Bank v. Rice*,<sup>5</sup> where Mr. Justice Gray says, "The general rule of law is, that a person who is not a party to a simple contract, and from whom no consideration moves, cannot sue on the contract, and consequently that a promise made by one person to another, for the benefit of a third person who is a stranger to the consideration, will not support an action by the latter." In *Edmundson v. Penny*,<sup>6</sup> Gibson, C. J. says, "The plaintiff must unite in his person both the promise and the consideration of it, in order to recover."

A few illustrations of this rule may be given.

In *Treat v. Stanton*,<sup>7</sup> S. bequeathed \$100 to each of five nieces, and appointed T. her executor. He placed the amount of the legacies in the hands of the defendant, who agreed with him to pay the nieces when they became of age, according to the terms of the will. It was held that the executor, and not the nieces, was the proper person to enforce that contract.

In *Ross v. Milne*,<sup>8</sup> the defendant, in consideration of a transfer

<sup>1</sup> See *Corey v. Powers*, 18 Vt. 589 (1846); *Bank of the Republic v. Millard*, 10 Wall. 156 (1869); *Guthrie v. Kerr*, 85 Pa. St. 303 (1877).

<sup>2</sup> *Bourne v. Mason*, 1 Ventris, 6 (1669); *Crow v. Rogers*, 1 Str. 592 (1724); *Price v. Easton*, 4 B. & Ad. 433; 1 N. & M. 303 (1833).

<sup>3</sup> 1 B. & S. 393 (1861).

<sup>4</sup> See also *Byrne v. Byrne*, 7 Ir. Jur. N. S. 221 (1862).

<sup>5</sup> 107 Mass. 41 (1871).

<sup>7</sup> 14 Conn. 445 (1841).

<sup>6</sup> 1 Pa. St. 335 (1845).

<sup>8</sup> 12 Leigh, 204 (1841).

of property to him by the mother of the plaintiff, agreed with her to pay the plaintiff £ 500 within two months after the mother's death ; and it was held that the plaintiff could not recover upon that contract, as the consideration moved from another. In *Cummings v. Klapp*,<sup>1</sup> the plaintiff had an execution against one C. for \$72.21, which he put into the hands of an officer for collection. The defendant, a friend of C., promised the officer to pay the debt in three months, in consideration of the officer's forbearance for that time to collect of C. Held, that the plaintiff, not being privy to the promise, nor consenting to the forbearance, could not maintain an action upon it. So if A. has a claim against B, and B., having a similar claim against C., obtains a promise from C., for a consideration paid him by B. to pay A.'s claim, A. cannot maintain an action against C. on that promise, being a stranger to the consideration and to the promise, and not having accepted C. as a debtor in lieu of B.<sup>2</sup> In *McCoubrey v. Thomson*,<sup>3</sup> one G., owning a farm of the value of £196, wished to divide it equally between M. and T., and all three agreed that he might convey it to T., and T. promised to pay £98 to M. Held that M. could not maintain an action for the amount, although he was privy to the promise, simply because no consideration moved from him.<sup>4</sup>

So in *Linneman v. Moross*,<sup>5</sup> a father devised property to his son, who promised him, in consideration thereof, to pay the plaintiff, a daughter, \$10 a month for life. Held, that she could not maintain an action at law upon such promise, and that, if it created a trust, it could not be enforced on the law side of the court.

In *National Bank v. Grand Lodge*,<sup>6</sup> the Masonic Hall Association issued its bonds to the amount of \$200,000 ; some of which were held by the plaintiff. Subsequently, the defendant corporation voted to assume the payment of the bonds, provided the Masonic Hall Association would issue its stock to said Grand Lodge to the amount assumed as fast as the bonds were paid. Held, that the plaintiff could not recover on such promise, for want of privity, and Mr. Justice Strong thus states the rule on this subject :

<sup>1</sup> 5 Watts & S. 511 (1843).

<sup>2</sup> *Ramsdale v. Horton*, 3 Pa. St. 330 (1846); and see *Torrens v. Campbell*, 74 Pa. St. 470 (1893).

<sup>3</sup> 2 Ir. Rep. C. L. 226 (1868).

<sup>4</sup> See also *Faulkner v. Faulkner*, 23 Ont. Rep. 252 (1893).

<sup>5</sup> 98 Mich. 178 (1893).

<sup>6</sup> 98 U. S. R. 123 (1878).



"We do not propose to enter at large upon the consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. . But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt, being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it."

So where the defendant had agreed to deliver certain goods to A., and A. gave him a written order to deliver the goods to B., and the defendant accepted the order and returned it to A., who gave it to B. as collateral security on a debt, it was held B. could not maintain an action against the defendant on the order and acceptance, for he furnished no consideration for it, and the contract was with A. and not with B.<sup>1</sup>

It is for the same reason, among others, that the payee and holder of a check on a bank cannot maintain an action on a promise made by the bank to the drawer of the check, to pay all

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<sup>1</sup> *Rogers v. Union Stone Co.*, 130 Mass. 581; *Morse v. Adams*, Id. 585 (1881).

checks which he might draw on the bank, in consideration that he would deposit his funds in said bank, which had been done.<sup>1</sup>

So where in a policy of life insurance the company promises to pay the amount insured to the assured, his executors, administrators, or assigns, "for the benefit of his widow, if any," the widow cannot, at common law, maintain an action thereon in her own name,<sup>2</sup> especially if such policy be under seal.<sup>3</sup>

So a promise by a remaining partner to his retiring partner, upon a consideration between them, that he will individually pay all the firm debts, cannot in some courts be enforced against him individually by a firm creditor;<sup>4</sup> much less can such promise be enforced against one who was only a surety for the performance of such partner's promise, such surety receiving none of the assets.<sup>5</sup>

In Vermont too it is well settled that the general rule is that only the person to whom the promise is made, and from whom the consideration moves, can maintain an action at law upon it.<sup>6</sup> So in Michigan,<sup>7</sup> Minnesota,<sup>8</sup> and Indiana.<sup>9</sup>

Thus far there is *approximately* an accord in the different States on this subject. But there remains another class of cases where much difference of opinion exists. In the first place, it is quite generally agreed that if a debtor, without the knowledge of his creditor, conveys property to a third person, or, for some other consideration between them, procures a promise from such person to pay or guarantee the debt, the creditor cannot afterwards, upon learning of such promise, recover the debt from such third person, not having discharged the original debtor.<sup>10</sup> And logically that

<sup>1</sup> Carr v. National Security Bank, 107 Mass. 45 (1871); Bank of the Republic v. Millard, 10 Wall. 152 (1869); Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82 (1871).

<sup>2</sup> Bailey v. N. E. Insurance Co., 114 Mass. 177 (1873); Chamberlain v. The N. H. Fire Ins. Co., 55 N. H. 249 (1875); Stowe v. Phinney, 78 Me. 244 (1886).

<sup>3</sup> Flynn v. North Am. Life Ins. Co., 115 Mass. 449 (1874).

<sup>4</sup> Merrill v. Green, 55 N. Y. 270 (1873); Morehead v. Wriston, 73 N. C. 398.

<sup>5</sup> Campbell v. Lacock, 40 Pa. St. 448 (1861); and see Morrison v. Beckey, 6 Watts, 349 (1837).

<sup>6</sup> Crampton v. Ballard, 10 Vt. 251; Pangborn v. Saxton, 11 Vt. 79; Hall v. Huntoon, 17 Vt. 244; Fugure v. Mutual Society, 46 Vt. 369; Fairchild v. N. E. Mut. Life Association, 51 Vt. 623.

<sup>7</sup> Wheeler v. Stewart, 94 Mich. 445; Hidden v. Chappel, 48 Mich. 527.

<sup>8</sup> Jefferson v. Asch, 53 Minn. 446.

<sup>9</sup> Salmon v. Brown, 6 Blackf. 347; Farlow v. Kemp, 7 Id. 544; Britzell v. Fryberger, 2 Ind. 176; Conklin v. Smith, 7 Ind. 107.

<sup>10</sup> Owings v. Owings, 1 H. & G. 484 (1827); Butterfield v. Hartshorn, 7 N. H. 345, (1834); Blymire v. Boistle, 6 Watts, 182 (1837); Warren v. Batchelder, 15 N. H. 129 (1844); Finney v. Finney, 16 Pa. St. 380 (1851); Manny v. Frazier, 27 Mo. 419 (1858);



rule would apply, although the debt to the plaintiff be secured by mortgage of the debtor's real estate, and, in his subsequent conveyance of such estate to the defendant the latter assumes and promises to pay the mortgage debt to the plaintiff as a part of the consideration of the conveyance. *Mellen v. Whipple*,<sup>1</sup> is an important case in support of this position ;<sup>2</sup> especially so in case of a promise by a second mortgagee to the mortgagor, which the first mortgagee seeks to enforce in an action at law in his own name.<sup>3</sup>

In such cases, as well as in cases of unsecured debts, the grantor of the equity has undoubtedly a right of action against the grantee, if he fail to pay the mortgage debt within a reasonable time after maturity ;<sup>4</sup> in which action the grantor can recover damages to the full amount of the mortgage debt, if overdue, even if he has not yet paid it.<sup>5</sup> If the mortgagee himself also has a right of action against the grantee of the estate, the latter may be liable to two actions by different parties, acting independently of each other ; and after having paid the debt in full to his grantor, who has retained the money, the grantee is still in danger of being called upon by the mortgagee to pay again to him.

Many cases, however, have enforced such contracts against the grantee in a suit by the mortgagee ; but some of them were brought distinctly in equity ; some were on the equity side of a court which combines both law and equity ; some rest upon the assumed ground that the estate conveyed to the defendant and the retention of part of the purchase price by him makes him the holder of a trust fund to which the creditor can resort in law, even

*McLaren v. Hutchinson*, 18 Cal. 80 (1861) ; *Clapp v. Lawton*, 31 Conn. 95 (1862) ; *Robertson v. Reed*, 47 Pa. St. 115 (1864) ; *Pipp v. Reynolds*, 20 Mich. 88 (1870) ; *Turner v. McCarty*, 22 Mich. 265 (1871) ; *Halsted v. Francis*, 31 Mich. 112 (1875) ; *Wheat v. Rice*, 97 N. Y. 296 (1884) ; *Edwards v. Clement*, 81 Mich. 513 (1890) ; *Morrill v. Lane*, 136 Mass. 93 ; *Borden v. Boardman*, 157 Mass. 410 (1892).

<sup>1</sup> 1 Gray, 317 (1854).

<sup>2</sup> And see also *Prentice v. Brimhall*, 123 Mass. 293 (1877) ; *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650 (1876) ; *Biddell v. Brizzolana*, 64 Cal. 354 (1883) ; *Page v. Becker*, 31 Mo 466 (1862) ; *U. S. Mortgage Co. v. Hill*, Mass. Dist. Ct. (1879) ; *Gurnsey v. Rogers*, 47 N. Y. 233 (1872).

<sup>3</sup> *Brown v. Stillman*, 43 Minn. 126 (1890) ; *Pardee v. Treat*, 82 N. Y. 385 (1880) ; *Clark v. Howard*, 74 Hun, 229 (1893) ; *Vrooman v. Turner*, 60 N. Y. 280 ; *Lorillard v. Clyde*, 122 N. Y. 498 (1890) ; *Durnhurr v. Rau*, 135 N. Y. 219 (1892).

<sup>4</sup> *Braman v. Dowse*, 12 Cush. 227 (1853) ; *Pike v. Brown*, 7 Cush. 133 (1851).

<sup>5</sup> *Locke v. Homer*, 131 Mass. 93 (1881) ; *Furnas v. Durgin*, 119 Mass. 501 (1876), and cases cited on p. 507 ; *Reed v. Paul*, 131 Mass. 129 (1881) ; *Williams v. Fowle*, 132 Mass. 385 (1882).

without any promise; while still others consider that the mortgagor, when receiving the promise, acts as agent for the mortgagee, which act the latter may, and by bringing the action does, ratify and adopt. But none of them seem to deny the liability of the grantee to an action by his grantor to whom the promise is made, and from whom alone the consideration is received; and this view seems to leave the grantee liable to as many actions as there are creditors of the grantor whom he has agreed to pay. Some of the cases sustaining such actions are *Burr. v. Beers*; <sup>1</sup> *Thompson v. Thompson*; <sup>2</sup> *Thorp v. Keokuk Coal Co.*; <sup>3</sup> *Merriman v. Moore*; <sup>4</sup> *Urquhart v. Brayton*; <sup>5</sup> *Miller v. Billingway*; <sup>6</sup> *Wood v. Moriarty*; <sup>7</sup> *Crawford v. Edwards*; <sup>8</sup> *Booth v. Conn. Mutual Life Ins. Co.*<sup>9</sup>

There are several classes of cases, sometimes cited as supporting actions by a mere beneficiary, but which when carefully examined fall quite short of affirming such to be the general rule.

1. The first is where the consideration is advanced by and the promise is made to a third person, who is acting as agent or on behalf of the plaintiff, either known or not known to be such agent; for in such cases the consideration is in legal contemplation advanced by the plaintiff himself, and the promise is made to him.<sup>10</sup> Some early cases seem to have held that a near relationship between the promisee and the plaintiff, such as father and son, would sufficiently constitute an agency, so that the action might be maintained by the son upon a promise made to the father.<sup>11</sup> The modern view, however, is that such relationship does not, in and of itself, create an agency, and is at most only a circumstance tending to show an actual agency, and that something more must be shown than mere relationship to vary the rule applied in other cases.<sup>12</sup>

2. The second is where the plaintiff furnished some part of the consideration, and shared also in the promise; as where a debtor transfers all his property to a third person, who agrees with him and his creditors that he will pay the grantor's debts to them, and they assent to it, and discharge the original debtor; no doubt such creditors can recover of the promisor, for they part with a consider-

<sup>1</sup> 24 N. Y. 178.

<sup>4</sup> 95. Pa. St. 78.

<sup>7</sup> 15 R. I. 578.

<sup>2</sup> 4 Ohio St. 333.

<sup>5</sup> 12 R. I. 169.

<sup>8</sup> 33 Mich. 385.

<sup>3</sup> 48 N. Y. 253.

<sup>6</sup> 41 Ind. 489.

<sup>9</sup> 43 Mich. 299.

<sup>10</sup> See *Carnegie v. Waugh*, 2 D. & R. 277 (1823); *Hubbert v. Borden*, 6 Whart. 79 (1840); *Barry v. Page*, 10 Gray, 398 (1858); *Ford v. Williams*, 21 How. 287 (1858).

<sup>11</sup> *Dutton v. Poole*, 2 Lev. 210 (1677); *Felton v. Dickinson*, 10 Mass. 287 (1813).

<sup>12</sup> *Tweddle v. Atkinson*, 1 B. & S. 396; *Marston v. Bigelow*, 150 Mass. 45; *Wilbur v. Wilbur*, 17 R. I. 295.



ation by discharging the original debtor, and are also participants in the promise. These cases are plain enough on the familiar doctrine of novation.<sup>1</sup>

3. The third, and by far the most numerous class, is where a debtor places money, or its equivalent, in the hands of a third person, upon his promise to pay the creditor; the creditor in such cases can recover the amount of such third person. This is familiar law everywhere.<sup>2</sup> But such recovery is usually by an action for money had and received to the plaintiff's use, — an equitable action, — sustainable, not *because* the defendant promised to pay to the plaintiff, but equally sustainable although he actually makes no such promise,<sup>3</sup> on the familiar ground that, wherever one has money in his hand which in equity and good conscience belongs to another, the latter may recover it in assumpsit for money had and received. This is so, even if the defendant refuses to pay it over on demand.<sup>4</sup>

That the action in such cases is not based upon the defendant's express promise to pay the plaintiff is apparent from the fact that if the defendant, for one and the same consideration, also promises to do some other thing for the plaintiff besides paying the debt, the plaintiff could not enforce such special promise in other respects. So also, if another person who does not himself receive the money, or other property, gives his guaranty to the debtor that the actual receiver shall deliver the money or pay the debt promptly, the creditor cannot maintain an action against such guarantor for failure to perform the promise.<sup>5</sup> The fact also that the creditor can recover only the amount so placed in the defendant's hands, and not necessarily his whole debt, although the defendant promised to pay the whole, shows that the action is not founded upon the special promise, but only upon the fact of assets received.

Many of the cases cited in support of the general right of a mere

<sup>1</sup> Tatlock v. Harris, 3 T. R. 180; Heaton v. Angier, 7 N. H. 397; Wilson v. Copeland, 5 B. & C. 228.

<sup>2</sup> Lilly v. Hays, 5 Ad. & El. 548; 1 N. & P. 26 (1836); Crampton v. Ballard, 10 Vt. 251 (1838); Arnold v. Lyman, 17 Mass. 400 (1821); 9 M. & W. 411; Carnegie v. Morrison, 2 Met. 402 (1841); Phelps v. Conant, 30 Vt. 277 (1858); Bank of Missouri v. Benoist, 10 Mo. 327 (1847); Putnam v. Field, 103 Mass. 556 (1870); Torrens v. Campbell, 76 Pa. St. 470 (1873); Barber v. Bucklin, 2 Denio, 45 (1846); Delaware & Hudson Canal Co. v. Westchester Co. Bank, 4 Denio, 97 (1847); Beers v. Robinson, 9 Pa. St. 29 (1848); Vincent v. Watson, 18 Pa. St. 96 (1851).

<sup>3</sup> Hall v. Marston, 17 Mass. 575.

<sup>4</sup> Frost v. Gage, 1 Allen, 262 (1861).

<sup>5</sup> See Campbell v. Lacock, 40 Pa. St. 448.

beneficiary to bring an action fall under one or the other of these three heads ; some others are explainable on other grounds, while, on the other hand, a few are quite in conflict with the views herein expressed, and the authorities cited above.

One other consideration bearing upon this question. All agree that on sealed instruments and promissory notes a person not the payee cannot recover merely because it is expressed to be "for the benefit" of such person. But why any difference, so far as the right of action is concerned, between a promise under seal and one not ? If the promisee is as distinctly and specifically named in the one case as in the other, is there any substantial reason for applying a different rule ?

In view of the authorities upon this subject, can it be safely said, as it sometimes is, that *at common law*, "whenever one makes a promise to another for the benefit of a third person, the latter may maintain an action at law upon such promise" ?

*Edmund H. Bennett.*

BOSTON, Nov. 1, 1895.



GENERAL AND PARTICULAR INTENT IN  
CONNECTION WITH THE RULE  
AGAINST PERPETUITIES.

A STATE Court of reputation has lately decided an important question of common law contrary to every previous case. The question has come up repeatedly in the English courts as well as in the courts of many of the United States, and has always been answered the other way. Yet the decision referred to is no careless or ignorant expression of opinion. It is a well considered judgment, written with full appreciation of the unbroken authority against it.

The case is *Edgerly v. Barker*, decided by the Supreme Court of New Hampshire in an opinion written by Chief Justice Doe, and to be published in the 66th volume of the New Hampshire Reports, pp. 434-475, with advanced sheets of which I have been favored. Such a decision is an unusual occurrence and deserves examination.

The case was this. Hiram Barker, a resident of New Hampshire, died, leaving a will and codicils which were duly proved. After sundry legacies, he gave the residue of his estate, real and personal, which was about \$600,000, to trustees in trust to pay his daughter Clara \$2,000 a year, and more if necessary for her comfortable support; to pay \$1,000 a year, or more in the discretion of the trustees, to his son, Hiram H. Barker, for the support of himself and his family, if from his habits and mode of life he should prove himself safe and competent to have the use and expenditure of the money; if not, then the trustees to have the expenditure of the money for the same purpose; to furnish means for the education of all the son's children, including those born after the testator's death; if the son should "become and remain temperate, sober, and correct in his habits" for five years together, \$5,000 to be paid to him, and at the end of ten years and of fifteen years further sums if he should remain "perfectly temperate and of good and regular habits"; and to pay to his son's wife, should she survive him, \$500 a year or more at the trustees' discretion.

Then came the clause under which the question arose. It provided that the trustees should pay to each of said children of the

testator's son, when said child should reach twenty-one, and to each child of his said daughter, if she should have any, the sum of from \$3,000 to \$5,000, if such child should be temperate and of good capacity to manage the money, and from time to time thereafter, as the wants and necessities of the children should require, the trustees should pay out such further sums as might be necessary; and "when the youngest of said children shall arrive at the age of forty years, then all my estate shall be theirs, to have and to hold the same to them and their heirs, those of them of good and regular habits and of capacity to do business and manage property, to take care of and manage, as trustees, the portion or portions thereof belonging to those, if any, who are not then possessed of such habits and capacity; but before said property shall vest in and be theirs, proper, suitable, and sufficient bonds or other security must be given by them for the payment of said sum or sums to my said daughter, if living, so long as she shall live, to my said son's widow if she shall then be living, so long as she lives and remains his widow, and also for the good and sufficient support of my said son so long as he shall live."

The executors of the will brought a bill of interpleader against the testator's son and daughter, and against the trustees. The counsel for the trustees contended that the gift of the residue to the grandchildren was good; the son's counsel, that it was bad.

There were of course four questions:—

*First.* To whom was the residue given?

*Second.* Was the gift vested or contingent?

*Third.* If contingent, was it too remote?

*Fourth.* If too remote, what was the consequence?

The first two questions are questions of construction. The Chief Justice begins his opinion thus: "The construction of the will, including the question whether the testator intended the remainder, which he devised to his grandchildren, should vest in them before they became entitled to a distribution of it, is determined as a question of fact by competent evidence, and not by rules of law." This mode of expression is peculiar to the learned Court. Whether correct or not, it is unnecessary for the matter in hand to consider.

*First.* The first question the Chief Justice answers by saying that the residue is given to living grandchildren and the issue *per stirpes* of deceased grandchildren. This is a highly novel construction, but it is purely a matter of interpretation, and I do not dwell upon it.



*Second.* The Court assumes that the gift to the grandchildren is contingent. By including the issue of deceased grandchildren in the class of residuary legatees the Court does away with one of the chief arguments for calling the gift vested. Yet there is another circumstance that points strongly towards vesting, and that is the power given the trustees to make payments to the testator's grandchildren before the final distribution. This power might be, and probably would be, exercised to a very different extent with different grandchildren, and yet, if the final gift be contingent, no account can be taken of this.

I have no desire to criticise the conclusion, or rather the assumption of the Court, that the gift is contingent. On the contrary, if I may take the liberty of saying so, it seems to me correct. The only gift to the grandchildren is the gift to pay when the youngest reaches forty; this makes the gift *prima facie* contingent; and the circumstances fortifying this conclusion seem to be greater than those against it. Yet it should be borne in mind that the testator (as is not unfrequently the case) had wishes which are really inconsistent, and that his wishes that the interests should vest fail of effect only because more and weightier indications of intention are inconsistent with their vesting. I want to insist upon this, because, as I think will be apparent to the learned reader, the circumstances making in favor of the vesting of this gift rendered it easier for the Court to introduce its new theory into the law than it would have been in the case of an unquestionably contingent gift.

*Third.* The gift to the grandchildren then being contingent, is it too remote? Of this there can be no doubt. The gift is to them at forty, which is obviously beyond the period allowed by law.

*Fourth.* What then is the result? The answer which has always hitherto been made in like cases is, that the gift is void, and there is an intestacy. The Supreme Court of New Hampshire now says that the fund is to be distributed to the grandchildren when they reach twenty-one.

Until this case of *Edgerly v. Barker* the law, as held in every other jurisdiction where the common law prevails and the question has come up, is this. If a gift is made to a person or class as filling a particular character at a time which may be too remote, the court will not substitute therefor a gift to the person or class filling the character at a time within the limits. Thus, for a gift to such of the testator's grandchildren as reach twenty-five the court

will not substitute a gift to such of the grandchildren as reach twenty-one or some less age. It would be pedantic to multiply authorities for this statement. Half a dozen from England, the United States, Canada, and Australia will suffice.<sup>1</sup>

Indeed, the Supreme Court of New Hampshire does not suggest that there has ever been a decision or a judicial *dictum* of any kind denying or questioning the proposition above stated.

The Chief Justice's line of reasoning, as I understand it, is this:—

(1) It is conceded that there must be some restraint on the creation of future interests.

(2) There is no statute in New Hampshire on the subject.

(3) There is no decision of the New Hampshire Court on the subject.

(4) The Court therefore must adopt or make a rule.

(5) The Rule against Perpetuities as administered in England is later than the settlement of New Hampshire, and therefore the decisions of the English courts are not binding precedents in that State.

All these propositions are unquestionably correct.

The Court then goes on to lay down this rule. When there is a primary intention to make a gift to a class, and a secondary intention that the gift shall take effect at a period which may be too remote, the Court will give effect to the primary intention by substituting a gift to the class to take effect at a period which is within the limits.

The Court then refers to certain cases which, although not precisely in point, it deems to be analogous and to furnish a support to its conclusion.

Any comments on this novel doctrine of the New Hampshire Court fall naturally under four heads:—

I. The departure of the Court from the law held in other States.

II. The fallacy contained in the new doctrine.

III. An examination of the cases supposed to be analogous.

IV. The applications of the doctrine.

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<sup>1</sup> Leake v. Robinson, 2 Mer. 363; Sears v. Putnam, 102 Mass. 5; Coggins's Appeal, 124 Pa. 10; Albert v. Albert, 68 Md. 352; Meyers v. Hamilton Co., 19 Ont. 358; Ker v. Hamilton, 6 Vict. L. R. Eq. 172.



## I.

It is true that there is no precedent which the Court of New Hampshire has to regard as binding that compels it to follow the rulings elsewhere ; but I submit it is a serious thing deliberately to break away from the *consensus* of the English speaking world on this subject. True, the matter is not one of commercial intercourse, and therefore it is not so important that the law should be uniform upon it ; but persons often own land in States other than their own, and it is no slight evil that the laws governing the settlement and devolution of property should differ.

Again, I am no blind admirer of the Rule against Perpetuities, but it is a doctrine of purely judicial origin, and it has grown to fit the ordinary dealings of the community. It is, too, a well established, simple, and clear rule. There are indeed some few cases where the law is still unsettled, but they are largely on matters which will never come up in this country, such as the creation of long terms attendant upon estates tail. The process of adjudication has been a process of clearing and simplification, and the tendency of legislation, so far as it has touched the matter at all, has been to make the rule more stringent.

It is a dangerous thing to make such a radical change in a part of the law which is concatenated with almost mathematical precision. A striking instance is shown by the fate of New York. Before the year 1828, the forty or fifty volumes of the New York Reports disclose but one case involving a question of remoteness. In that year the reviewers (clever men they were, too) undertook to remodel the Rule against Perpetuities, and what a mess they made of it ! At my last count 249 cases have come before the New York courts under the statute as to remoteness,—an impressive warning on the danger of meddling with the subject.

## II.

The doctrine of the New Hampshire Court in this case involves a fallacy. It speaks of a primary intent to give to persons and a secondary intent to give to them at a particular time, and it purports to preserve the primary intent while discarding the secondary intent by substituting another time. This assumes that the persons remain the same, and only the time is changed. But that is precisely what does not occur ; with the time, the persons are changed. Take the present case. The testator meant to give to

those of his grandchildren who reached forty; the Court gives the property to those of the grandchildren who reach twenty-one. There may be six grandchildren who reach twenty one, and only one who reaches forty. Here shares are given to five persons whom the testator never meant to have it. There may be some answer to this, but it is a real and a very serious objection, and deserves an answer, and it gets none from the New Hampshire Court. The case is dealt with throughout as if the only question were whether the same persons should get the property at forty or at twenty-one. As remarked above, the circumstances which tended to show an intention to make this gift vested probably obscured the fact from the Court that it was taking property devised to one set of people and giving it to another.

### III.

Let us look now at the cases which seemed to the New Hampshire Court to furnish a treatment of legal situations analogous to that which it adopted in *Edgerly v. Barker*.

A. Under a power to lease for twenty-one years, a lease for forty years is good in equity for twenty-one years. This is true.<sup>1</sup> It is allowing a present vested interest to continue as long as a power permits. It has no similarity with changing the condition precedent on which a future interest is to vest so as to give it to those persons who happen to answer to a particular description at one time, instead of giving it to those persons who answer to it at another time.

We have here in fact an instance of that confusion of ideas which has been such a *fons malorum* in questions of remoteness. The Rule against Perpetuities is aimed against remote future contingent interests, and has nothing to do directly with the continuance of present interests. The failure to keep this clearly in view has led, and always will lead, to error.

B. "Under a statute restricting to a term not exceeding twenty-one years, the time for which a tenant for life can be empowered to lease, a testamentary gift to a tenant for life of a power to lease for sixty-three years is not void. If he makes a lease for more than twenty-one years it is void for the excess, and no more. Nelson, C. J., and Bronson and Cowen, JJ., in *Root v. Stuyvesant*, 18 Wend. 257, 273, 275, 277, 290, 291, 302, 306, 307, 313." Then

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<sup>1</sup> *Campbell v. Leach*, Amb. 740, 745.



follow two long extracts from Nelson, C. J., and Cowen, J. Would one suppose from this that Nelson, C. J., and Bronson and Cowen, JJ., were the dissenters from the judgment of the Court of Errors affirming the decision of the Chancellor? Yet such is the fact.

The will in *Root v. Stuyvesant* was made before the statute, and at a time when terms for sixty-three years were good, (though brought within the purview of the statute by a subsequent republication,) and the Chancellor and the majority of the Court of Errors thought that the statutory inhibition of these terms so altered the scheme of the will as to avoid it altogether.

The particular proposition for which the opinions of the dissenting judges in *Root v. Stuyvesant* are cited, that an appointment under a power is not rendered bad by the fact that a bad appointment could be made under the power, is good law enough. Indeed, it is hard to imagine a power under which a bad appointment might not be made, e. g. a power to appoint to issue.

What the opinions of the dissenting judges are cited for is not entirely clear. If it is that the court can mould invalid provisions so as to make them good, it is enough to say that the opinion of the Chancellor and the majority of the Court of Errors is directly opposed to such a view.

C. The doctrine of *cypres* forms a recognized exception to the rule that construction is not affected by questions of remoteness. That doctrine is this. When land is devised to an unborn person for life, remainder to his children in tail, the unborn person takes an estate tail; so also when there is a series of successive life estates.

This doctrine was originally confined to executory trusts, where, of course, it was all well enough, but it has been extended to legal estates.

Now it should be observed that this doctrine has always been regarded with suspicion and disapproval by the ablest judges. Lord Kenyon was the first, in 1786, to extend it beyond the case of executory trusts, yet he himself, in *Brudenell v. Elwes*,<sup>1</sup> said: "The doctrine of *cypres* goes to the utmost verge of the law. . . . We must take care that it does not run wild. . . . I know that great judges entertained considerable scruples at the time concerning that decision. *It went indeed to the outside of the rules of construction.*" So Sir J. L. Knight Bruce, V. C., in *Boughton v.*

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<sup>1</sup> 1 East, 442, 451 (1801).

James<sup>1</sup>: "The doctrine has gone, at least, far enough." So the Court of Exchequer in *Monypenny v. Dering*<sup>2</sup>: "Without meaning to say that the doctrine [ of *cypres* ] is satisfactory to our minds, it is sufficient for us to say that those authorities are not precisely in point, and we do not feel inclined to carry the doctrine on which they rest one step further." And, finally, in *Brudenell v. Elwes*,<sup>3</sup> Lord Eldon, C. : "Those cases have at least gone, as Lord Kenyon observes, to the utmost verge of the law ; and I shall find it very difficult to alter an opinion I have taken up, that it is not proper to go one step farther ; for in those cases, *in order to serve the general intent and the particular intent, they destroy both.*"

But the indispensable condition for the application of the doctrine of *cypres* is that the persons who take under it shall be *no others, no more and no fewer*, than those to whom the testator intended to give the estate. If the estate tail is suffered to continue undocked, then exactly the same persons will take under the doctrine of *cypres* that the testator intended to take, and it is this equivalence which satisfied the formalism of Lord Kenyon, while later judges of more enlarged mind have recognized that the power of docking the entail really changes the persons who can take, and this has made them regret the decision.

The doctrine of *cypres*, circumscribed as it has been, is in truth a strong argument against a change by the authority of the court from one set of persons to another set of persons.

D. It is strange that Chief Justice Doe has not brought forward a class of cases which furnish in truth a more plausible support to his views than any which he has given. If a testator devises his estate to his grandchildren in equal shares, and then directs that of the share of each granddaughter the income shall be paid to her for life and the principal conveyed to her children in fee, the gift to the children being bad for remoteness, the modification of the devise is rejected, and each granddaughter takes a fee. In such a case it may be said that there is a general intent and a particular intent, and that the latter is sacrificed to the former ; but there is no change of devisees ; to certain persons fees simple are given, and then those are cut down to life estates for a purpose ; the purpose failing, the cut down is rejected by the court, and the fees simple revive, *but to the same persons.* Again, *the testator has himself distinguished and separated the general intent from*

<sup>1</sup> 1 Coll. 26, 44.

<sup>2</sup> 16 M. & W. 418, 434.

<sup>3</sup> 7 Ves. Jr., 382, 390.



*the particular intent.* When he has not done this, and the only gift is to granddaughters for life with remainders in fee, a granddaughter will only take a life estate ; in order for a granddaughter to take the fee, there must be a distinct gift to her of the fee, and afterwards a separate modification.<sup>1</sup>

E. The history of the doctrine of general and particular intent in the law is well known. It was first introduced in *Robinson v. Robinson*,<sup>2</sup> in the attempt to explain the Rule in *Shelley's Case* as a rule of construction ; it produced the hopeless tangle of decisions of which Lord Eldon has said, "The mind is overpowered by their multitude, and the subtlety of the distinctions between them" ; and it was only when the doctrine of general and particular intent was repudiated, and it became firmly settled that the Rule in *Shelley's Case* was not a rule of construction, not a rule, however artificial, to discover intention, but a rule the object of which was to defeat intention, that any order was introduced into that chaos.

Thus Lord Redesdale, in *Jesson v. Wright*<sup>3</sup> : "To say that the general intent shall overrule the particular is not the most accurate expression of the principle of decision, but the rule is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise." So Lord Denman, in *Doe v. Gallini*<sup>4</sup> : "The doctrine that the general intent must overrule the particular intent has been much and, we conceive, justly objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results."<sup>5</sup> The doctrine "is now exploded."<sup>6</sup> In the fourth edition of *Jarman on Wills*<sup>7</sup> is an elaborate discussion, proving the futility of the doctrine ; but in the fifth edition<sup>8</sup> the doctrine is dealt with as now obsolete, and only a short note inserted.

This piece of legal history is full of instruction. The Rule in *Shelley's Case* is not a rule for interpretation, it is a rule the object of which is to defeat intention. Courts struggled to deal with it as a rule of construction, and instead of saying that the testator meant so and so, but the Rule forbade this intention being carried out, they strove to divide the testator's intention into two parts, one part which agreed with the Rule, and which they called

<sup>1</sup> *Whitehead v. Rennett*, 22 L. J. Ch. 1020. <sup>5</sup> See *Hayes's Principles*, pp. 44, 110.

<sup>2</sup> *Burr.* 38.

<sup>6</sup> *Tud. L. C. on R. P.* (3d ed.) 618.

<sup>3</sup> 2 *Bligh*, 1.

<sup>7</sup> *Vol. ii.* p. 484.

<sup>4</sup> 5 *B. & Ad.* 621, 640.

<sup>8</sup> *Vol. ii.* p. 1312, n.

the general intent, and another part which could not be made to square with the Rule, and which they called the particular intent, and they sacrificed the latter to the former, and said they were carrying out the general intent, when in truth both general and particular intent alike were defeated by the Rule. The consequence was an unspeakable quagmire, of which no one can have a notion who has not ventured into it, and out of which escape was finally had only by the total repudiation of the theory of general and particular intent, and by a firm grasp on the principle that the object of the Rule is to defeat intention.

The Rule against Perpetuities is, in like manner, a positive rule intended to defeat intention. To quote from the case of *Dungan v. Smith*<sup>1</sup>: "The existence of the Rule as to Perpetuities is certainly no reason for altering the construction of the bequest." Per Maule, J. "Our first duty is to construe the will; and this we must do, exactly in the same way as if the Rule against Perpetuities had never been established, or were repealed when the will was made; not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it." Per Parke, B.

That is not what the Supreme Court of New Hampshire has done in *Edgerly v. Barker*; instead of saying the testator meant a gift to those persons who were his grandchildren and their issue, when the youngest living grandchild reached forty, and then applying the rule, finding the gift was beyond the limits and cutting it off, the Court has striven to divide the testator's intention into two parts, part which is consistent with the Rule, and which they call the general intent, and part which will not square with the Rule, and which they call the particular intent, and then has proceeded to sacrifice the latter to the former, when in truth it has been substituting a new intent, and giving the property to a set of persons different from those to whom the testator gave it.<sup>2</sup>

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<sup>1</sup> 12 Cl. & F. 546.

<sup>2</sup> The argument upon which the learned counsel for the trustees chiefly relied was that the English Commissioners on the Law of Real Property, in their Third Report, had recommended the passage of a statute which should provide, among other matters, as follows:—

"19. Where a future estate or interest shall be limited to vest on the event of a person, not born nor *en ventre sa mère* at the creation of such future estate or interest, attaining or not attaining an age greater than twenty-one, the settlor or testator shall be deemed to intend the age of twenty-one.

"20. Where an estate or interest shall be made determinable either by the original



Legal history, like other history, repeats itself; here is the Supreme Court of New Hampshire taking the first step in that chase after the will o' the wisp of general and particular intent which the Court of King's Bench began more than a hundred years ago, and which, after long wanderings and stumblings and groanings of spirit, it has now finally abandoned.

limitation thereof, or by virtue of any proviso, condition, or agreement upon the event of a person, not born nor *en ventre sa mère* at the creation of such future estate or interest, attaining or not attaining an age greater than twenty-one, the settlor or testator shall be deemed to intend the age of twenty-one."

But upon this argument it is to be remarked:—

1. That this statute was not recommended by the Commissioners as declaratory of the common law, but as an innovation.

2. That while so many of the recommendations of the Commissioners were adopted by Parliament, this never has been.

3. That other changes in the common law recommended by the Commissioners, and at least as beneficial, have never been adopted in New Hampshire. For instance, the rule in question is mercy and wisdom combined compared with the rule which requires a freehold to support a contingent remainder, and yet this last has been upheld in New Hampshire with uncalled for severity.

4. That the Commissioners, feeling the great danger of tampering with the content of the doctrine of remoteness, or of attempting to distinguish between primary and secondary intent, made an arbitrary rule that when a testator says  $21 + x$  years, he shall be conclusively presumed to mean twenty-one years, and that this is a pretty strong thing even for a statute.

5. That the case of a contingent gift to a shifting class, such as arose under the Barker will, was not within the purview of the contemplated provisions. These provisions were intended to deal with individuals, not with changing classes; the estate dealt with is one limited to vest, not on a *class*, but on a *person* reaching or not reaching a certain age. The cases in the minds of the Commissioners were of a nature like this: "To A. for life, remainder to his eldest son in fee, but if he should die before he reaches twenty-five without leaving issue living at his death, to A.'s second son in fee, but if such second son should die before he reaches twenty-five without, &c., then to A.'s third son," &c. The Commissioners intended to provide that if a gift to A. was followed, on a contingency which might not occur until  $21 + x$  years, by a gift to B.,  $21$  should be substituted for  $21 + x$ , but they did not intend that C. should be substituted for B., which is precisely what the New Hampshire Court has done.

It is very noticeable that in their report the Commissioners say: "Sometimes a limitation is made to depend on the event of unborn persons attaining or not attaining some age greater than twenty-one"; but when they come to sum up their conclusions in the exact language of a proposed statute, seeing perhaps a possible danger of misconstruction, they change the plural into the singular, showing that they mean to deal with an individual and not with a changing class. In other words, the Commissioners obviously had in mind the advancing of the time for a legacy to A. so as to enable A. to take; but there is no evidence, either in the Report or in the Propositions, that they ever contemplated applying the method so as to take property given to one set of legatees and transfer it to another. To do that has been reserved to the Supreme Court of New Hampshire.

## IV.

*Applications of the New Hampshire Doctrine.*

A. Take first the present case. Here was a gift to grandchildren when they reached forty, the Court cut it down to grandchildren when they reached twenty-one, but why take that date? Why not give it to the grandchildren at once, without waiting till they reach twenty-one? The only answer would seem to be, "Although we cannot put off the period of distribution as late as the testator wished, we will put it off as long as we can." But that the court has not done. Why not order the fund to be distributed among those grandchildren who are living at the end of twenty-one years from the death of both children? Or, better still, why not make the time of selection to be twenty-one years after the death of both the testator's children and of all his grandchildren living at his death? Or, again, why not make it twenty-one years after the death of all the students now at Dartmouth College? What can be said of the time selected by the Court, more than for any or all these?

B. Or if there be special circumstances in this case pointing to twenty-one, how about a case where there are no such special circumstances?

C. Again, (what the devise might easily have been in this case,) to such of the testator's grandchildren when the youngest reaches forty as are then of temperate habits. Would a gift to such of the grandchildren as were not drunkards at twenty-one satisfy the general intent of the testator?

D. A gift to A., a young infant, for life, after his death to any widow he may leave for life, and on the death of such widow to such of his children as are then living. Is this time to be cut down, and if so, to what period must survivorship be referred? The death of the husband? Twenty-one years after the death of the husband? The death of any wife born in the testator's lifetime? Twenty-one years after the death of any wife born in the testator's lifetime?

E. To a church for a parsonage, but, whenever it is no longer used as a parsonage, then to A. and his heirs. Here is a general intent to have the property go over; under certain circumstances this can be done, under other circumstances it cannot; why not carry out that general intent under the former circumstances, if



it cannot be under the latter? Why not allow it if the parsonage is given up within twenty-one years after the testator's death? Or within twenty-one years after the death of all the present members of the First Regiment of New Hampshire Militia?

F. To the person who shall be Chief Justice of New Hampshire fifty years from to-day. Is Chief Justice Doe entitled to that gift? Is the Chief Justice who shall be in office twenty-one years from now entitled? Or shall the Chief Justice who attends the funeral of the last member of the New Hampshire bar now living take it?

Here are cases, not recondite cases, but such as occur to one *currente calamo*. They could be multiplied indefinitely. Outside of New Hampshire not merely would these cases present no difficulty to the courts, but any decently instructed lawyer could answer any of them promptly and with certainty. In New Hampshire, the more learned and acute the lawyer, the greater the perplexity in which such cases would plunge him.

In fact, this novel doctrine substitutes for the set of devisees named by the testator another set selected out of an infinite number by the *arbitrium* of the Court.

*John Chipman Gray.*

NOTE.—I had the honor of being consulted by the learned counsel for the testator's son on the question whether the gift to the grandchildren under Mr. Barker's will was vested or contingent, and I came to the conclusion that it was contingent, and so advised. I assumed that the question of remoteness would be decided as it had been everywhere else, and that therefore the only real point in issue was the vesting or contingency of the gift.

I fully recognize the value of the traditional practice, that counsel should take their licking quietly, and not let their dissatisfaction go beyond oral grumbling; but on the point upon which I advised, the Court was with me, and on the matter here discussed, the view adopted by the Court was one which had never seemed possible to me, and to which I had not given any consideration. Besides, in any new edition of my book on the Rule against Perpetuities, I must deal with the subject, and therefore it seems better to speak of it while it is fresh.

THE UNAUTHORIZED OR PROHIBITED  
EXERCISE OF CORPORATE POWER.

AMONG recent contributions to the literature of Corporation Law is a paper by Judge Seymour D. Thompson entitled "The Doctrine of *Ultra Vires* in relation to Private Corporations."<sup>1</sup> The essay is worthy of unusual attention, since it seems fair to assume that the views therein expressed will be reasserted in an expanded form in the forthcoming volumes of Judge Thompson's Commentaries.<sup>2</sup>

The learned author begins his discussion with a strong statement of his conviction "that the Anglo-American law" relating to "the so-called doctrine of *ultra vires*" is "in a state of hopeless and inextricable confusion."<sup>3</sup> He disclaims all intention of writing a treatise on the subject within the compass of a magazine article, but he addresses himself to an examination of principles and a statement of certain general conclusions. The discussion is cast in historical form. The author passes in review "the ancient doctrine of *ultra vires*"; he gives us the history of what he is pleased to call "the revolt" against it; he presents in outline the "modern doctrine"; and he concludes with a statement of his own views upon the ideal solution of the problems under discussion. If his treatment of the subject is true to the facts of legal history, the results of Judge Thompson's investigation will be accepted as an important contribution to legal literature. In the judgment of the present writer, however, there are in the essay certain points of no inconsiderable importance with respect to which there is room for at least an intelligent difference of opinion.

In the first place, it is not clear that any tribunal ever gave a consistent adherence to the doctrine which Judge Thompson calls "the ancient doctrine." In the second place, it may be doubted whether there is any justification for his view that modern developments of the law of Corporate Power are to be explained upon a

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<sup>1</sup> 28 American Law Review, 376.

<sup>2</sup> Commentaries on the Law of Private Corporations. Bancroft-Whitney Co.: San Francisco, 1895. At the time of the writing of the present paper, the volume containing the chapters on Corporate Power has not made its appearance.

<sup>3</sup> Page 376.



principle of moral evolution. Again, it seems to be reasonably certain that those courts which to-day adhere to "the modern doctrine" have always recognized it in substantially its present form: in other words, it is not modern. Finally, it is submitted that much of importance is lost through a failure to recognize with distinctness the operation in this field of two opposing judicial conceptions of public policy. The more or less consistent following of one or the other of these has determined the attitude of all courts which have attempted the solution of problems of Corporate Power. It may not be unprofitable to examine these points in their order.

The "ancient doctrine" is thus stated by the learned author:—

"A contract of a corporation which is either unauthorized by or in violation of its charter or governing statute, or which is entirely outside the scope of the powers of its creation, is void, in the sense of being no contract at all because of the want of the power of the corporation to enter into it; that such a contract will not be enforced by any species of action in a court of justice; that, being void *ab initio*, it cannot be made good by *ratification*; nor by any succession of *renewals*; and that no *performance* on either side can give validity to it, so as to enable a party to the fund [to found?] any right of action upon it. The doctrine of the courts was, that, unless a corporation was empowered by its charter or governing statute to make a given contract, it was prohibited by the principles of the common law; that when a court of justice was appealed to for its enforcement, it stood upon the footing of any other prohibited illegal or immoral contract, and, as such, was subject to the operation of the principle, that a court of justice would not aid either party to enforce it, or to get back what he had lost under it, but would leave both parties in the predicament where, by their illegal act, they had placed themselves."

Assuming for the moment that this is the correct statement of an historical legal doctrine relating to unauthorized and prohibited contracts, it is important to note the misleading implication that, at the common law, the parties to all "prohibited illegal or immoral" contracts are helpless in respect of recovering what has been lost, and that the law, in such cases, will "leave both parties in the predicament where, by there illegal act, they have placed themselves."<sup>1</sup> Now the invalidity of an unauthorized corporate contract arises, not from the subject matter, but from the incapacity of one of the contracting parties. It is said to be

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<sup>1</sup> Pages 378, 379.

illegal: but it is illegal, not because the agreement is itself immoral, but because the law denies the corporation power to enter into the agreement. It is *malum prohibitum* and not *malum in se*. It is therefore important to distinguish between "illegal prohibited contracts" and "illegal immoral contracts," which Judge Thompson seems to group together. The learned author would doubtless be ready to admit that, where the contract is prohibited merely, a plaintiff in default may recover at common law from the defendant (provided the contract is not wholly executed) to the extent that may be necessary to restore both parties to the *status quo*.<sup>1</sup> Again, where the defendant is in default and the plaintiff is not, the plaintiff, speaking generally, may recover in all cases in which the parties are not *in pari delicto*.<sup>2</sup> Indeed, Judge Thompson refers in another connection to these rights of recovery in quasi contract,<sup>3</sup> and he cites Lord Mansfield's decision in *Moses v. Macferlan*.<sup>4</sup> It follows, therefore, that the learned author speaks inadvertently when he assimilates to "any other prohibited contract" the case in which, for example, a railroad purchases and uses a steamboat and is absolved from all obligation to pay for it, and the further case in which an insurance company has made a prohibited loan and is cut off from all right to recover on the evidence of indebtedness.<sup>5</sup> If, as the learned author necessarily implies, the defendants retained there ill-gotten gains in these cases, they did so under the operation of a principle peculiar to the law of corporations, and altogether different from that which is applicable to other prohibited contracts at the common law. With these observations we pass to the first of the several questions proposed for discussion,—the question, that is, whether the "ancient doctrine" outlined by Judge Thompson ever did claim the allegiance of a court of common law. The two cases which have just been stated are used by Judge Thompson as the two leading illustrations of the doctrine under consideration. They are *Pearce v. R. R. Co.*<sup>6</sup> and *Insurance Co. v. Lawrence*.<sup>7</sup> In the former case the plaintiff, as indorsee of a promissory note, sued the corporation which had given the note to evidence an indebtedness for a steamboat made and delivered by the payee at the request of the corporation. The plaintiff could recover, if at all, only upon the contract, and the

<sup>1</sup> See Keener on Quasi Contracts, pp. 259 *et seq.*

<sup>2</sup> *Ibid.*, pp. 267 *et seq.*

<sup>3</sup> Page 390.

<sup>4</sup> 2 Burr. 1005.

<sup>5</sup> Page 379.

<sup>6</sup> 21 How. 441.

<sup>7</sup> 3 Wend. 482.



court was of opinion that the contract was in excess of the defendant's corporate powers. But Mr. Justice Campbell is careful to observe that the court abstains from pronouncing any opinion upon the problem which would have arisen had the plaintiff been the vendor of the steamboat or an assignee of the vendor's interest. In other words, the liability of the defendant in a suit by the vendor in disaffirmance of the contract is not discussed. The case is not, therefore, an illustration of the "ancient doctrine." In the second of the two cases an insurance company, prohibited from discounting notes or engaging in the business of banking, nevertheless lent money upon promissory note secured by a pledge of corporate stock as collateral. In an action brought by the corporation as payee of the note, it was held that the action could not be maintained. There is here no decision to the effect that the plaintiff was without remedy. The right of recovery independently of contract is not negatived. Indeed, as is well known, another of these *Utica Insurance Cases*,<sup>1</sup> reported in the same volume of Wendell, (and cited, by the way, by Judge Thompson,) contains the remark of Chief Justice Savage to the effect that, though a prohibited security taken by the corporation is void, the plaintiff may nevertheless recover on the count for money lent. The soundness of this distinction between the validity of the security and of the contract of loan may be open to question;<sup>2</sup> but, in any event, the cases are not authorities for the proposition in support of which they are cited. While these cases are the only ones stated at length in the text as illustrations of the ancient doctrine, several others which deserve attention are cited in the notes. The most important of these are the decisions of Mr. Justice Gray in the Supreme Court of Massachusetts, and subsequently in the Supreme Court of the United States. These cases — *Davis v. R. R. Co.*<sup>3</sup> and *Central Transportation Co. v. Pullman's Palace Car Co.*<sup>4</sup> — were both actions based on contracts which the court treated as unauthorized. They are not in any sense ancient cases, the former having been decided in 1881, and the later in 1890. In the earlier case nothing in money or property appeared to have passed from plaintiff to defendant, so that the right of recovery in disaffirmance

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<sup>1</sup> *Utica Ins. Co. v. Cadwell*, 3 Wend. 296.

<sup>2</sup> See remarks of Selden, J., in *Tracy v. Talmage*, 14 N. Y. 162; Keener on Quasi Contracts, p. 272.

<sup>3</sup> *Davis v. Old Colony R. R. Co.*, 131 Mass. 258.

<sup>4</sup> *Central Transportation Co. v. Pullman's Palace Car Co.*, 139 U. S. 24.

was not discussed, although distinctly recognized. In the later case the plaintiff unquestionably had a claim against the defendant to prevent the unjust enrichment of the latter. In point of fact, equitable proceedings in disaffirmance of the contract and for an accounting are to-day pending in the Circuit Court of the United States for the Eastern District of Pennsylvania.<sup>1</sup> The other cases cited need not be reviewed in detail. The writer, after careful consideration, ventures the assertion that in no one of them is there to be found a recognition of the doctrine outlined by the learned author. Possibly, therefore, Judge Thompson is unnecessarily severe when he asserts<sup>2</sup> that "such was the doctrine which our ancestral lawyers mouthed with owl-like wisdom, and which our ancestral judges rolled as a sweet morsel under their tongues."

The second point for examination is the "revolt against the doctrine of *ultra vires*." This judicial movement is treated by Judge Thompson as a moral reformation. He begins with some remarks to the effect that half the exertions of an advocate are put forth in maintaining the wrong side in legal controversies. Then follows this somewhat startling language: "The natural result is, that, when reasoning on legal subjects, lawyers, though upright and just in their private affairs, fall into the habit of dismissing conscience and of laying moral considerations out of view. This habit follows them when they ascend the bench as judges; it has settled like a fog over the professional intellect and conscience to such an extent that we now constantly hear from high sources the infamous proposition that there is no necessary connection between the law and concrete justice or morality." In such a state of moral chaos one could scarcely have hoped to find the germs of higher life. It might well have been feared that persistence in the practice of upholding the wrong for at least one half the time would have ended in the hopeless perversion of conscience and the destruction of the moral principle. But no: Judge Thompson assures us that the renaissance of conscience had its beginning when all that was good seemed about to perish. "Nevertheless, the judicial and professional conscience, dulled as it had been by this habit of reasoning in behalf of wrong, could not forever endure a rule of law which enabled one party to a contract, perfectly innocent when made between natural persons, to keep the fruits of it, and repudiate it

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<sup>1</sup> No. 44, October Sessions, 1886. See report of one of the stages of this litigation in 65 Fed. Rep. 158.

<sup>2</sup> Page 380.



because it had been made with an artificial person having no power to make it." He then finds the first signs of the revolt of conscience in the "timid" suggestions from the bench that a recovery could be had by the aggrieved party,—not on the unauthorized contract, but in an action for money had and received. As an instance of the beginning of the reform he cites (among other cases) *Pittsburgh, etc. R. R. Co. v Keokuk Bridge Co.*,<sup>1</sup> decided as late as 1888, and involving on this head only such principles as the court had recognized long before. "Gradually," proceeds Judge Thompson, "the doctrine took a less technical and more intelligible form." He cites the case above referred to as one illustration of this advanced development, although he had already quoted it as an example of the beginning of reform. He then makes the following observation: "It cannot escape attention that the doctrine stated in this section was a great advance over the original conception that, as in the case of any other illegal or immoral contract, the law would not aid either party to an *ultra vires* contract, but would leave them in the condition where they had placed themselves, under the operation of the maxim *in pari delicto potior est conditio defendentis*. It was certainly a great stride to lay hold of the doctrine formulated by that great and just-minded judge, Lord Mansfield, that the party who had parted with his money under such a contract has a right of action on the principle of recovering money paid by mistake, or upon a consideration which has failed."

This observation, with its closing reference to *Moses v. Macferlan*,<sup>2</sup> at once brings into strong relief the assertion hazarded above, that the so called "modern doctrine" is in fact the doctrine to which the Supreme Court of the United States and certain other tribunals have adhered from the beginning. This was the third point proposed for examination. The assertion is really a corollary to the proposition that the "ancient doctrine" was never seriously put forth by any court. An examination of the opinions of Mr. Justice Gray in *Davis v. Old Colony R. R. Co.*,<sup>3</sup> and in *Central Transportation Co. v. Pullman's Palace Car Co.*,<sup>3</sup> will, it is submitted, make it clear that the position of these courts to-day is not inconsistent with that of Mr. Justice Campbell some forty years ago.<sup>4</sup> It is of course true that in modern times there has been a steady

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<sup>1</sup> 131 U. S. 371.

<sup>2</sup> 2 Burr. 1005.

<sup>3</sup> *Supra*.

<sup>4</sup> *Pearce v. R. R. Co.*, 21 How. 441.

movement in the direction of enforcing unauthorized and prohibited contracts as between the parties. It is insisted, however, that Judge Thompson's "ancient doctrine" was not the starting point of this movement, and that the movement has not manifested itself as part of a development of the right to recover in quasi contract. It is a movement which has resulted from a new judicial conception of public policy, and from a more or less careful study of the needs of the business world. It is a movement of vast importance, and it is fraught with as much interest for the student as any tendency in modern legal development. The writer has ventured to suggest as a defect in Judge Thompson's work his failure to exhibit the operation of this more modern conception of public policy in contrast with the older view which treated unauthorized contracts as illegal. This was the fourth point for discussion. A few thoughts derived from a study of this tendency may not be out of place.

If this modern development is treated as being independent of moral considerations, and as being the result of the gradual substitution of a new theory of public policy for the old, a most interesting and important question presents itself. Is the interest of the community best subserved by adhering to the theory that a corporation is a legal person with limited powers, or by disregarding this theory in the determination to enforce all contracts, not immoral, which have been in fact entered into between the parties? If the former view were to prevail, it would follow that contracts made in excess of corporate power or in defiance of statutory prohibition should receive judicial condemnation of a more or less severe character. They might be condemned as being wholly void, or as being merely voidable. In either event, it might be held that their invalidity depended either upon the fact that such contracts are immoral, — *contra bonos mores*, — or that they are illegal merely, without any moral quality. If immoral, then (upon settled principles of law) no recovery could be had by either party from the other, even if the suit were brought in disaffirmance of the contract. If illegal, as being what is somewhat unscientifically called *malum prohibitum* merely, no action could be maintained upon the contract, but before the contract was wholly executed a recovery, with respect to benefits conferred, could be had by a plaintiff in default, and by a plaintiff against a defendant in default — except where the parties were *in pari delicto*. Thus, conceivably, three distinct developments might take place in pursuance of this fundamental conception of public policy. (1) An unauthorized or pro-



hibited contract might be treated as voidable, and not void. No court seems to have developed this theory, except as respects the question of agency which is involved between stockholders and directors when such a contract is made. On this point, as is well known, there have been many decisions, — especially in England, where *Ashbury Ry. Carriage Co. v. Riche*<sup>1</sup> settled the law upon its present footing. (2) An unauthorized or prohibited agreement might be treated as immoral. In that event, no action would lie against the corporation or in its favor for a breach of the contract; nor could a suit be maintained by either party for benefits conferred thereunder. It has been seen that this is declared by Judge Thompson to have been the “ancient doctrine” upon this subject. No authorities which support this position are cited by the learned author, and none are known to the present writer. (3) An unauthorized or prohibited agreement being “unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it,”<sup>2</sup> the courts would refuse to permit an action to be maintained upon the void agreement, but would permit a recovery in quasi contract. That is to say, the courts would recognize the right of a plaintiff who had performed his part of an agreement to be put into the *status quo* as respects a defendant who refused to perform, — unless, indeed, the nature of the case were such that the parties would be treated as *in pari delicto*. The courts would also, on such a view, recognize the right of a plaintiff who was unwilling to perform the illegal contract to sue a defendant not in default and recover from him the money or property with which the plaintiff had parted.<sup>3</sup> This doctrine bears a resemblance to what Judge Thompson<sup>4</sup> styles “the more modern doctrine,” which is a result of the “revolt” above described. No jurisdiction is known to the present writer, however, in which this doctrine is recognized in its completeness. After the decision in *Pearce v. R. R.*, it seemed as if the Supreme Court of the United States would adhere to this line of development, and a strong assertion of the essentials of the doctrine is to be found in the language of Mr. Justice Gray in *Central Transportation Co. v.*

<sup>1</sup> L. R., 7 H. L. 653.

<sup>2</sup> Mr. Justice Gray in *Central Transportation Co. v. P. P. Car Co.*, 139 U. S. 24, 59 (1890).

<sup>3</sup> In Keener on Quasi Contracts (p. 273, n.) there is a suggestion to the effect that this is the true position for a court to take if an *ultra vires* contract is to be treated as unenforceable.

<sup>4</sup> Page 391.

Pullman's Palace Car Co.<sup>1</sup> Unfortunately, however, the symmetry of the development was marred by other language in the opinion, which seems to recognize a right to recover on what is called an "implied contract" in cases where it is admitted that recovery on the express contract will not be allowed, and where it seems demonstrable that, consistently with settled principles, there can be no recovery in quasi contract.<sup>2</sup> This would be an anomaly. Except in these particulars, however, Judge Thompson's "modern doctrine" has been the doctrine of the Supreme Court of the United States from the beginning.

If we turn to the second of the two possible views of public policy in respect of corporate contracts, we must expect to find an entirely different development. When a court makes up its mind to enforce, as between the parties, a contract which is wholly foreign to the business of the corporation, and perhaps specifically prohibited by statute, it must be prepared to deal, sooner or later, with two legal problems. In the first place, there is the difficulty which results from the theory of special capacities. Under this theory, which is strongly asserted in a multitude of American cases,<sup>3</sup> a corporation has no powers except such as are conferred by the grant contained in the charter. Under the doctrine of general capacities, the effect of incorporation is to create a legal person with the powers of every other legal person with respect to contracts, subject to such prohibitions upon the exercise of certain powers as the charter may impose. Under the former theory a corporation has power to make certain contracts only, and, by supposition, the suggested contract is not one of them. Without power there can be no contract. If there is no contract, there is nothing to enforce. It is the case of the contract of a married woman. This difficulty can, in the judgment of the writer, be overcome in one way only, — by discarding the doctrine of special capacities and by adopting the doctrine of general capacities. A corporation would then stand upon the footing of a natural person, with power to make every kind of contract, subject to such penalties as the sovereign might impose for violating prohibitions

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<sup>1</sup> *Supra*.

<sup>2</sup> See 2 Am. Law Reg. & Rev. (N. S.) 296, for a discussion of this point by the present writer.

<sup>3</sup> For example, in *Thomas v. R. R. Co.*, 101 U. S. 71; refusing to assent to the argument of counsel for plaintiff, who made a strong plea for the recognition of the doctrine of general capacities.

upon making any particular form of contract. If a banking corporation were forbidden to do an insurance business, but nevertheless issued a policy, it would be perfectly reasonable for the courts to permit the assured to recover against the company upon the ground that the prohibition did not involve the invalidity of the contract as a penalty,<sup>1</sup> but that the prohibition was merely a condition subsequent in the grant of franchises by the sovereign, for a breach of which the sovereign might resume them if desired. It is well known that the doctrine of general capacities is the doctrine of the English courts; but those courts have treated the designation of a field of activity in the charter as a statutory prohibition against engaging in any other field of activity, and they have steadfastly refused to enforce all prohibited contracts. In other words, they have maintained the legal theory in its integrity, but they have deemed that the doctrine of general capacities must be held in check by some vigorous rule of contrary tendency, lest corporations should become all powerful. Of the English courts, therefore, it may be said that their adherence to the doctrine of general capacities is no indication of sympathy with the second view of public policy under discussion. With them this theory of corporate power is the result of a conviction that it best accords with the common law theory of the effect of incorporation.<sup>2</sup> It follows that, while the result of the English decisions could, on principle, be reached equally well on the doctrine of special capacities, yet the American decisions which proceed upon the policy now under discussion can be justified, on principle, only on the doctrine of general capacities, coupled with the view that a prohibition, express or implied, is a collateral condition or penalty to be enforced by the State. The American courts, nevertheless, are constantly asserting the doctrine of special capacities in much the same language as that used by Judge Thompson, while at the same time they are enforcing between the parties contracts which are not merely unauthorized, but actually prohibited. In other words, they sacrifice legal theory in the interest of their chosen policy.

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<sup>1</sup> The Supreme Court of the United States in a well known case, *National Bank v. Matthews*, 98 U. S. 621 (1878), took this view of the provision in the National Banking Act forbidding banks to lend money on real estate security. See also the language of Mr. Justice Field in *National Bank v. Whitney*, 103 U. S. 99 (1880).

<sup>2</sup> See for a discussion of this point the Appendix on "Limits of Corporate Power" in *Pollock on Contracts*.



The second legal obstacle which the courts must meet and overcome, if the view in question is to prevail, is the resulting difficulty of maintaining any theory whatever which places limitations upon the corporate power to contract. It will be observed that the exigencies of the policy under discussion require the courts to enforce *ultra vires* contracts as between the parties, leaving the State to institute proceedings, by *quo warranto* or otherwise, to deprive the offending body of its charter. But in point of fact, in ninety-nine cases out of a hundred the State has no real interest in the matter. Even in those cases in which we lawyers are accustomed to speak most glibly of "public interest," it often happens that the conventional conception of the interest of the community is just the reverse of its interest in fact. Take the case of a railway lease which has not been specifically authorized. The lessor refuses to perform certain covenants, and an effort is made to compel specific performance. In no jurisdiction will the desired decree be made, because it is the conventional view that the public is interested in seeing to it that no one but the original grantee of the franchise shall exercise it. Suppose the offer is made to prove by affidavit, or otherwise, that the entire community affected is anxious that the lease should be enforced. The offer is of course rejected by the court. It may be assumed to be clear that, upon submitting the documents in the case to the legislature, an enabling act authorizing the lease could have been had for the asking. The fact remains that corporations are driven to the legislature in these cases to seek protection from the courts.<sup>1</sup> The reason for the persistence of the theory that a franchise of a public nature is inalienable without the consent of the sovereign is not altogether clear. As yet no court has been found so iconoclastic as to shatter the venerable doctrine.<sup>2</sup> But, as has been said, the cases in which the public and the State have a direct interest, even by convention, are far from numerous. In the absence of direct interest there is no reason to expect active interference with corporate activity in any considerable number of cases. There is even a decision in the books in which the right of the State to forfeit a charter

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<sup>1</sup> Central Transportation Co. v. Pullman's Palace Car Co. is a striking illustration of this. There the legislature had passed an act specially enabling the lessor corporation to make the lease in question, but the court nevertheless held that the authority was not sufficiently explicit.

<sup>2</sup> See the dissent of Mr. Justice Bradley in *Penna., &c. R. R. v. St. L. A. & T. H. R. R.*, 118 U. S. 290.

in such a case is denied. We should then have a law practically without a sanction in the matter of restraint upon the making of corporate contracts. This state of affairs is to some extent recognized; but it does not seem to be perceived that a significant alternative is presented to the judges in consequence of it. Shall the courts continue to maintain some theory of limited corporate power, or shall they take the absence of real public interest in so vast a number of cases as an indication that the so called "*ultra vires*" has survived whatever usefulness it may have possessed? Apparently unconscious of the existence of this problem, the courts have undertaken the task contemplated by the former alternative, and have set themselves to discourage unauthorized and prohibited contracts by enforcing them between the parties only in favor of one who has performed his part. Readiness to perform is not enough: the contract must be executed in part before the judge will give it recognition. Here is a fruitful source of litigation. What constitutes execution within the meaning of the rule? Is execution synonymous with that "passage of money or property" which would give rise to a cause of action in quasi contract, even under the former of our two conceptions of public policy? These and many other similar questions confront the courts in their attempt to signify a qualified disapproval of unauthorized or prohibited contracts.

What of the second alternative? Is there any reason, on principle, why the courts which believe in treating the prohibition as a condition should not carry out the theory to the end, and enforce all corporate contracts precisely like other contracts, and subject only to the limitations which the general law of contracts recognizes? It seems to the writer that, if the doctrine of general capacities were once adopted, a strict adherence to our second line of policy would lead legitimately to that result. Some of the considerations in favor of the doctrine of general capacities have already been advanced. It remains to determine whether harm would result from the removal of all restraint from the corporate power to contract, — whether, in other words, society would be the loser through the death of the whole law of corporate power and *ultra vires*. It is interesting to note that Judge Thompson is to be found upon the negative side of this question. "My own view," he says,<sup>1</sup> "is that the doctrine of *ultra vires* has no proper place in the law

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<sup>1</sup> pages 397, 398.



of private corporations, except in respect of contracts which are *bad in themselves*, the making of which are [*sic*] prohibited by considerations of public morality, of justice, or of a sound public policy, and which therefore stand upon such a footing that neither party can be regarded as innocent or blameless in entering into them." This is the same thing as saying that doctrines of corporate power should no longer exist in any case, for the qualifications enumerated by the learned author already obtain in the case of contracts between man and man. It is somewhat difficult to perceive just how Judge Thompson reaches his conclusion upon principle, for he seems to have but a hazy conception of the two great theories of corporate power, and it is not clear that he even perceives the importance of working out his result upon one or the other of them. His view may be accepted, however, as an evidence of what is believed to be the general sense of the American world to-day; namely, that society is vastly more interested in the adjustment of the actual relations subsisting between corporations and individuals than in the maintenance of fancied relations between corporations and the State. The franchise to be a corporation is no longer in the hands of favorites of the Crown. It is no longer true that the owners of this franchise have their brethren at their mercy, or even that they occupy a position of peculiar advantage as compared with them. Corporate activity has taken its place in the mercantile world side by side with individual enterprise, and the two work together on equal terms. There are many aggregations of capital which do not take on the corporate form; while, on the other hand, behind the corporate machinery of many a gigantic enterprise stands a single individual, who has become the owner of all, or almost all, the shares. It is indeed to the interest of the State that these business ventures should succeed, and it may be said that the scope of their activity should therefore be circumscribed. But surely the question of what branches of business should or should not be combined together is not a question for the courts. The mercantile world must be left to work out the solution of this problem for itself. If, when the problem is solved, it is found that the union of two forms of business enterprise (as, for example, banking and insurance) is fraught with peculiar danger to the public, the case becomes one that is appropriate for legislation; and specific measures may then be adopted in order to deal with the difficulties which present themselves. Moreover, it must not be forgotten that, independently of these considerations, it remains



true that a dissenting minority of stockholders would still have all the rights of a partner in respect of confining his associates to the enterprise to which he agreed to contribute his capital. This is not a case in which partnership law has drawn upon corporation law for its conception of limitations upon the power of the majority. The reverse has been the case, as may be seen by a consideration of Lord Eldon's decision in *Natusch v. Irving*.<sup>1</sup>

The observations which have just been made in regard to legislative declarations of policy with respect to particular forms of enterprise are of course applicable to the case of quasi public corporations. Where the nature of the business is such that the public has an interest in the conduct of it, it seems not unreasonable to insist that the business shall be regulated *as a business*, and not with reference to the fact that it is carried on by a corporation. It is settled that a strictly private corporation may mortgage its property and "plant," unless prohibited. It is said to be equally well settled that a corporation with public duties to perform, as, for example, a railroad, cannot make a valid mortgage contract unless specifically authorized. The reason assigned is that a mortgage "may ripen into a sale," and that in the latter case a sale means that the railroad can no longer perform its duties to the public. In the judgment of the writer, it is altogether unphilosophical to make this distinction the basis of a judicial development of a doctrine of corporation law. If the distinction is really of any importance, it should be made the subject of a legislative enactment regulating the management of railroads. The prediction may be hazarded that before twenty-five years have passed away our courts will have manifested a disposition to depart from the present basis of decision, and that they will have indicated an intention to abandon the attempt to regulate a business by developing the law relating to one out of several agencies by which, conceivably, that business may be carried on.

It must not be forgotten, however, that the latter part of this discussion has been concerned with the *possible* rather than with the *actual* in corporation law. In point of fact, there is a grand division of jurisdictions upon the primary question of public policy outlined above. The Supreme Court of the United States,<sup>2</sup> the Supreme Courts of Massachusetts,<sup>3</sup> Alabama,<sup>4</sup> and a few other States, have

<sup>1</sup> Gow on Partnership, App., p. 398, ed. 3.

<sup>4</sup> Bank v. Dunkin 54 Ala. 471.

<sup>3</sup> Central Transportation Co. v. Pullman's Pal. Car Co., 139 U. S. 24.

<sup>2</sup> Davis v. Old Colony R. R. Co., 131 Mass. 258.

declared themselves definitely in favor of maintaining existing restrictions upon the corporate power to contract. They have, in general, refused to enforce unauthorized or prohibited contracts, even in favor of the party who has fully performed. The doctrine is entirely intelligible and consistent, and, in the main, it has been consistently applied. In a few cases, however (as has been seen), there are either dicta or actual decisions which seem to mar the symmetry of the system. If this doctrine becomes obsolete it will be the result, not of any inherent defects of structure, but because it is not in touch with the needs and requirements of the business world. In Pennsylvania,<sup>1</sup> on the other hand, and in New York,<sup>2</sup> New Jersey,<sup>3</sup> Indiana,<sup>4</sup> Illinois,<sup>5</sup> Minnesota,<sup>6</sup> Kansas,<sup>7</sup> and in many other jurisdictions, the courts have manifested a tendency to give a qualified adherence to the second theory of public policy, — hesitating to ignore altogether the legal restrictions upon corporate power, but refusing to permit the party who has received a benefit to take advantage of the defect of power when a suit is brought to enforce the contract. The position of these courts of the second group is believed by the writer (as has been pointed out above) to be unsound upon principle, unless the theory of general capacities is adopted; and unsound even then unless it is pushed to its legitimate conclusion, with the result of enforcing all corporate contracts, even when they are wholly executory, in every case where a contract between individuals would be enforced. In point of fact, the courts of the second group endeavor, in general, to work out the ends of justice upon the basis of a theory of estoppel. Where a corporation has received a benefit under a contract, it is said to be “estopped” from pleading the fact that the contract was unauthorized (or, in some cases, even that it was prohibited) as a defence to an action brought to enforce the agreement. This view seems to be open, upon principle, to certain serious objections. In most jurisdictions the courts are definitely committed to the position that those who deal with corporations are charged with notice of the limits of corporate power. In contemplation of law, when A.

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<sup>1</sup> *Wright v. Pipe Line Co.*, 101 Pa. 204.

<sup>2</sup> *Holmes, etc. Mfg. Co. v. Metal Co.*, 127 N. Y. 252.

<sup>3</sup> *Camden, etc. R. R. Co. v. Mays Landing R. R. Co.*, 48 N. J. L. 530.

<sup>4</sup> *State Board of Agriculture, v. Citizens' R. R. Co.*, 47 Ind. 407.

<sup>5</sup> *Heims v. Flannery*, 137 Ill. 309.

<sup>6</sup> *Auerbach v. Mill Co.*, 28 Minn. 291.

<sup>7</sup> *Sherman, etc. Town Co. v. Morris*, 43 Kan. 282.

makes an unauthorized or prohibited contract with a corporation he does it with his eyes open. He takes the risk attendant upon inability to enforce the agreement in a court of justice. It is accordingly somewhat difficult to manipulate the doctrine of equitable estoppel in his favor, in view of the fact that the act of the corporation was not the inducing cause of his present position. Nor does it help matters much to discard the theory that the chartered powers of a corporation are included in the citizen's stock of presumptive knowledge. A court must either go further than this, and declare that the public is presumed *not to know* what a corporation may lawfully do, or else the judges must prepare to receive proof in a particular case that the limitations of the charter were in fact brought home to the plaintiff. Of course it may be said, and it sometimes is said, that in these cases the term "estoppel" is not used in its technical sense. If this is true, the use of a scientific term in any other than its technical sense is perhaps open to criticism. It is said, for example, that this doctrine is applied "only for the purpose of compelling corporations to be honest in the simplest and commonest sense of honesty."<sup>1</sup> This means, presumably that corporations will not be permitted to do a wrong which would not be sanctioned in the case of an individual. The language just quoted occurs in a case in which a mining corporation borrowed money in order to engage in business in a place not authorized by its charter. A bill was filed by a stockholder to enjoin the prosecution of a suit by the lender upon the evidence of indebtedness. But if under similar circumstances an individual were to attempt to enrich himself unjustly under an illegal contract which was *malum prohibitum*, it would not be upon the basis of estoppel that his attempt would be frustrated by the courts. The contract would not be enforced, but a recovery in quasi contract would be permitted. If the courts which echo the language of Chief Justice Lawrence were strictly logical, they would either assimilate their views to those which the Supreme Court of the United States professes to hold; or else, at the other extreme, they would discard the view that corporate power is in its nature limited, and would embrace the radical doctrine which was advocated above.

This tendency to work out results upon the basis of a species of primitive estoppel is, however, a tendency which is not without

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<sup>1</sup> Chief Justice Lawrence, in *Bradley v. Ballard*, 55 Ill. 413.



interest. A result more strictly "equitable" might perhaps be reached if the courts were to hold that a corporation, by contracting, warrants its power and right to enter into the agreement. Suppose, for example, that a corporation makes a prohibited contract. In the face of the prohibition the contract will not be specifically enforced. Nor will the plaintiff be permitted to maintain an action upon it. Rights of recovery in quasi contract, however, are not broad enough to meet the requirements of the case. The corporation will accordingly be treated as having warranted its power and right to make the agreement. The subsequent assertion of a lack of power and right, although theoretically effective so far as disposing of the plaintiff's suit is concerned, now becomes a clear breach of the warranty. The measure of damage in an action for this breach is the value of the contract which the plaintiff has lost. This includes prospective profit and the loss of a bargain. Thus the plaintiff in such a case has every right except the right of specific performance. It goes without saying that such a theory presupposes the abandonment of the view that all the world has notice of the limits of corporate power. It is, of course, a somewhat fanciful theory, but it furnishes an interesting basis for a comparison with the modern German conception of damage by reason of the non-existence of contract, — "the negative interest of contract," as Jhering calls it (*Negatives Vertragsinteresse*). According to that conception, if A. leads B. to believe that there is a contract when, owing to facts which B. neither knows nor is bound to know, there is not, A., however innocent, is liable for the damages sustained by B. "He [A.] is not liable on the contract, for there is none; nor is he bound to put the other party in as good position as if he had a contract; but he is bound to put the other party in as good position as if there had never been a simulacrum of contract."<sup>1</sup>

If we return from the domain of theory to our final survey of existing conditions in American courts, it seems hard to escape a conclusion favorable to the view which results in the enforcement in so many cases of unauthorized and prohibited contracts. Incomplete

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<sup>1</sup> The language cited is that of Professor Munroe Smith of the Faculty of Political Science in Columbia College, to whom the writer is indebted for this reference to German law. Professor Munroe Smith adds: "I do not find that any German jurist has suggested the extension of the above principle to cases where a contract is void (or voidable) because of incapacity. Perhaps they regard these cases as falling under the restriction of 'grounds of invalidity which the other party was bound to know.'"

as it is, this doctrine seems to represent far better than the other the enlightened sense of the business world, and the prediction is hazarded that it is destined in its full development to be the doctrine of the future. But while it seems clear that we are still in the midst of the evolution of this department of corporation law, it is yet not impossible to discover the principles upon which that evolution proceeds. It is for this reason that the writer ventures to dissent from the view of Judge Thompson, that "the Anglo-American law upon this subject" is in a state of "hopeless and inextricable confusion." Nor does it seem to the writer to be true "that contradictory decisions are constantly rendered by the same courts; that opposing principles, tending to contrary results, jostle and crowd each other as the ice floes jostle and crowd each other going southward out of Baffin's Bay through Davis Straits; and that the judge seizes upon one of these principles to-day, and to-morrow upon another, and enlarges it or applies it according to the seeming exigencies of justice in that particular case." It is submitted, on the contrary, that the decisions upon corporate power are susceptible of scientific analysis and classification. It is, however, necessary that the investigator should give up the attempt to relegate this subject to the realm of moral reform, and that he should be content to see in it only the familiar spectacle of a gradual legal development brought about by a conflict between opposing views of public policy.

*George Wharton Pepper.*

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THE LAW SCHOOL.—In the November issue a “proportionally unprecedented increase” in the number of students in the School was predicted. The returns, complete up to December, fully justify the expectation. The enrolment is greater by sixty-four than it ever has been in the history of the School. The exact registration for seven successive years on Dec. 1, is given below:—

	1889-90	1890-91	1891-92	1892-93	1893-94	1894-95	1895-96
Third year	50	44	48	69	66	82	95
Second year	59	73	112	119	122	135	138
First year	86	101	142	135	140	172	224
Specials	59	61	61	71	23	13	9
Total	254	279	363	394	351	402	466

These figures show an increase over last year in each class, but a decrease of four in the number of special students. The third year class is larger than any previous third year class by thirteen. The second year class shows an increase of only three. The greatest gain is naturally in the first year class, which numbers fifty-two more than the next largest first year class.

One reason for the remarkable increase in the number of candidates for the degree doubtless is that this is the last year during which the old rules of admission will be in force. This year, for the last time, all Bachelors of Arts, all “graduates of Law Schools which confer the degree only after an examination upon a two years’ course of at least seven months each,” and all holders of the degree of Bachelor of Science, or other similar degrees, if they represent “an amount of linguistic training equal to that required of those who offer themselves for examination,”—all such are admitted without examination to be candidates for the degree of Bachelor of Laws. Those who pass the regular examinations in Latin, French, and Blackstone are also admitted as candidates for the degree.

But, beginning with next year, the new rules will be in effect. By these, only holders of certain specified degrees, and persons qualified to



enter the Senior Class of Harvard, will be admitted as candidates for the degree. All others, including holders of academic degrees who are not on the list, "graduates of Law Schools which confer the degree only after an examination upon a two years' course of at least seven months each," and all who pass the regular examination,—these will be admitted only as special students, and can obtain the degree only by entitling themselves in some way to enrolment as regular students, or by attaining a mark within five per cent of that required for the honor degree.

In connection with these changes in rules, the following table is instructive:—

Holders of degrees from Colleges whose graduates are to be admitted as candidates for the degree of LL.B. . . . .	352
Holders of degrees from Colleges whose graduates are <i>not</i> to be admitted as candidates for the degree of LL.B. . . . .	27
Harvard College Seniors on leave of absence from college . . . . .	18
Graduates of other Law Schools . . . . .	3
Students holding no degrees . . . . .	66
Total . . . . .	466

According to the above table, 370 of the 466 students now in the School would be eligible candidates for the degree under the new rules. The other 96, of whom 64 are first year students, would not get the degree except by attaining a mark within five per cent of the honor grade. In all probability, some of the 27 graduates of institutions that are not now recognized officially by the Harvard Law School would be admitted as candidates for the degree, for the list does not pretend to be exhaustive. The Law Faculty reserves the right to consider special cases on their merits.

The decrease in the number of special students is partly traceable to the policy of the Faculty in discouraging all such who do not care to work. Those who are ready to work find it just as easy under the old rules to attain regular standing. Undoubtedly, when the new rules go into effect, the number of specials will increase again. The present small numbers are also doubtless further caused by a prevailing misunderstanding as to the status of specials under the new arrangement. As has already been noticed, the special student will still have the same privileges as regular students, except that if he wishes a degree he must maintain a high standing, and he will not be admitted except on the definitely determined conditions set forth above, which it is needless to repeat. But whatever else may be said, it is generally understood that idlers have no place in the Harvard Law School. Of the nine specials now here, only one is ineligible for regular standing. The rest are enrolled as specials in order to take studies out of the year in which they would be regularly enrolled.

Perhaps the most significant fact in connection with all these figures on the total registration is that the third year class is increased. This is due to nothing so much as to a recognition both of the increase in the quantity of instruction offered and of the advantages of a third year of study.

Below are given three tables showing the sources from which six successive classes have been drawn, both as to previous collegiate training and as to the geographical districts from which the students come.

## HARVARD GRADUATES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	34	1	19	54
1894	30	2	17	49
1895	32	4	13	49
1896	23	7	17	47
1897	27	2	15	44
1898	42	1	25	68

## GRADUATES OF OTHER COLLEGES.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.
1893	5	9	21	35
1894	7	20	38	65
1895	8	14	30	52
1896	14	11	45	70
1897	9	12	56	77
1898	19	23	62	104

## HOLDING NO DEGREE.

Class of	From Massachusetts.	New England outside of Massachusetts.	Outside of New England.	Total.	Total of Class.
1893	4	1	7	12	101
1894	20	1	10	31	142
1895	16	3	14	33	135
1896	10	4	9	23	140
1897	26	7	16	49	170
1898	25	2	25	52	224

A glance at these tables shows several interesting facts. Most noticeable of all is the increase in the number of Harvard graduates, there being 24 more than last year in the first year class. There are also 27 more graduates of other Colleges than last year, while the number of students who do not hold academic degrees is increased by only three, a circumstance which speaks well for the high standard maintained in the School.

Next to Harvard, Yale send the most graduates to the class of 1898, there being 21 in all, the largest number ever in one class. Yale sent but 8 last year. Brown sends 11, Williams 9, Amherst and Princeton each 5, and Dartmouth 4. Leland Stanford, Bowdoin, and Trinity send 3 each, while six different Colleges send 2 apiece. Twenty-eight have each one representative in the first year class. The total number of educational institutions from which the class is drawn is 44. There are 87 whose homes are not in New England, and who have received no degree from Harvard, an increase of 9 over last year. All these figures are encouraging, as they point to a steady widening of the influence of the School.

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FACTORS ACTS AGAIN. — While the courts have treated the general subject of alienation of real estate in a broad and liberal spirit, in cases of personalty, on the other hand, whether as a matter of common law development or of statutory construction, they have resisted any attempts to encourage commercial interests at the cost of private rights. The extremes to which the doctrines of conversion have been carried, where, on the Continent, ownership has long ago given way to the exigencies of trade, is one instance. Another is the untiring opposition of the courts

to the Factors Acts,—an opposition which crops out in almost every case on the subject, and of which *Prentice Co. v. Page* (41 N. E. R. 279), a Massachusetts case, furnishes an example. A swindler, by false representations and forged certificates (arts which subsequently secured his conviction for larceny), managed to obtain goods from the Prentice Company, which he palmed off upon a purchaser for value without notice. This result he had accomplished by assuring the Prentice Company that he had already made contracts for the goods as their agent, and that he wished simply to complete the sales by delivery. Under these circumstances, and under a Factors Act that protected purchasers from agents “intrusted with the possession of merchandise or of a bill of lading, consigning merchandise to him for the purpose of sale,” the court decided that the word “sale” did not include a completed sale, and that a man intrusted with goods for the purpose of fulfilling a contract of sale was not a man intrusted “for the purpose of sale.”

In England in *Baines v. Swainson* (4 B. & S. 27) and *Shepard v. Bank* (7 H. & N. 661), the opposite result was reached. The court attempts to distinguish these cases by pointing out that in the English Factors Acts the provision is simply that the goods shall be “intrusted,” and not, the court says, “as ours, ‘intrusted for sale.’” It is noticeable, however, that in the Massachusetts act the phrase “for the purpose of sale” occurs only in connection with the bill of lading, and not with the merchandise. The court then tries to discredit *Baines v. Swainson* by quoting Blackburn, J., in *Cole v. Bank* (L. R. 10 C. P. 354, 373, 374), to the effect that Willes, J. in delivering judgment in *Fuentes v. Montis* (L. R. 3 C. P. 268), “speaks of *Baines v. Swainson* as going to the extreme of the law.” Yet on page 280 of L. R. 3 C. P. Willes, J. says, “The case of *Baines v. Swainson*, to which I entirely assent.”

Another ground on which the court rests its decision is the larceny by the agent. “It would be a contradiction in terms to say that goods are intrusted for sale to one who steals them.” That, however, is by no means perfectly clear. Larceny by trick is not at all inconsistent with persuading the owner to intrust goods to a rascal. The crime or fraud may render the guilty party punishable; but as Martin, B. said, in answer to a similar position taken in *Shepard v. Bank* (7 H. & N. 661, at 665), “he does not, however, the less intrust.” Looked at from the point of view of this anomalous species of larceny, this *ratio decidendi* also seems hardly satisfactory.

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ADMISSION TO THE BAR. — The General Council of the Quebec Bar is considering the advisability of admitting to practice, without examination, all who present diplomas from any law school in the Province. This suggests the query as to whether such a scheme is likely ever to secure general adoption. Perhaps it may not be universally known that in several of our States it already prevails. In Louisiana, Mississippi, West Virginia, and Wisconsin, the diploma of the law department of the State University is accepted in lieu of examination; in Georgia, two law schools are thus recognized; while in Illinois and Tennessee diplomas from any law school in the State, and in Indiana from any law school whatever, entitle their holders to admission to the bar. There is doubtless much to be said both for and against this policy. One who recalls the weeks of laborious memorizing, terminating in the severe mental strain of many consecutive hours of thinking and writing



at lightning speed in a badly ventilated room, is likely to regard a bar examination as an unfair test. Where there is but one law school in question, there certainly seems to be no serious objection to accepting its degree as evidence of the student's knowledge of common law, at least, if not of the statutes and practice. Where, on the other hand, the privilege is bestowed on two or more law schools, objections may arise from the inequality of standard, the strivings of the several faculties to enlarge their roll of students, and the ineffectiveness of the distant supervision exercised by the Bar. However, even under these circumstances, the question is worth discussing.

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JUDICIAL CHECK ON UNCONSTITUTIONAL LEGISLATION.—The exercise by the courts of this country of the power to declare acts of a co-ordinate legislature void because of unconstitutionality has become so much of a commonplace, that the peculiar circumstances which led to the establishment of the power are likely to be forgotten : and one is apt to think of this power of the judiciary as inherent in the nature of our government, and as such, accepted from the outset without dispute. The able and serious opposition which met the claim of this power in some of the original States is too frequently overlooked. As late as 1825, Gibson, J., of the Pennsylvania Supreme Bench, in *Eakin v. Raub* (12 S. & R. 330), vigorously denied the existence of the right claimed by the courts to disregard a legislative act because of its conflict with provisions of the State Constitution. A re-examination of the source of this power is demanded, when one finds it laid down as a principle established beyond dispute, that under a written Constitution the right of the judiciary to declare legislative enactments void for unconstitutionality is "the necessary logic of jurisprudence."

This is, in effect, the statement made by Prof. J. W. Burrage in a recent number of the *Political Science Quarterly* (September, 1895, Vol. X. pp. 422, 423).

That under the State and Federal Constitutions the American courts exercise this power rightfully, is settled beyond cavil. Yet it is not expressly granted in the Constitutions of the original States : nor is it clear, as Prof. Burrage would seem to assert, that it is expressly granted in the Federal Constitution. Nevertheless, one is not driven to defend the power as the "necessary logic of jurisprudence." Its existence is to be traced rather to the relations of the English courts to our colonial legislatures prior to the Revolution, to the effect of those relations on the conception of the powers of State judiciaries, and less remotely to the intentions of the framers of our early constitutions, than to a logical deduction from the mere existence of a written constitution. (See Thayer's *Origin and Scope of the American Doctrine of Constitutional Law*, 7 *HARVARD LAW REVIEW*, 129.)

Gibson, J., in the case of *Eakin v. Raub*, above referred to, points out that the powers of the judiciary fall into two classes, political and civil. The civil powers are the ordinary powers of the courts at common law, while the power by which any control or influence is exerted over other departments of government or their acts is a political power. At common law, the judiciary can possess no political power. Yet it is claimed that, by necessary implication, the existence of a written constitution confers upon the judiciary, in addition to its ordinary and

appropriate powers, the power to pass upon the constitutionality of legislative acts, that is, a power distinctly political. The burden of proof is obviously on those who make this assertion. The main argument in support of the claim is this: the Constitution is the supreme law of the land; it is the peculiar function of the judiciary to interpret the law; therefore, in case of a conflict between the supreme law and a law passed by the legislature, the latter must be declared void. It is of course essential to the cognizance and decision of such a conflict that the judiciary have the right to interpret the Constitution; but to say that the Constitution is the supreme law is not necessarily to say that it is law which the judiciary may interpret. What is really meant by the phrase, the Constitution is the supreme law, is that the Constitution is a set of rules binding on the several departments of government. Can it be said to follow that one department has the power to declare the meaning of the rules addressed to the other departments? Each department, according to the natural implication, should look to those rules addressed to itself, and determine their meaning. Because these rules are not binding if not enforced, is no reason that one department should deduce the power to enforce upon another department its interpretation of rules not addressed to itself. Rather it would seem to follow that the people who have formulated these rules, and have not expressly delegated the power to interpret and to enforce them, have reserved that power to themselves, in case the departments overstep their constitutional limits.

This view of the Constitution, that each department has a right to interpret those rules addressed to itself, and demand acquiescence in the interpretation from the other departments, is, it is true, a conception of the Constitution as directory rather than as mandatory and unyielding. Yet to-day, with the power of the judiciary in this country to declare acts of the legislature unconstitutional and void firmly established, much of the Constitution remains to all purposes directory. Many violations of its rules on the part of the legislature are not open to judicial cognizance. Two classes of violations are sufficient examples: one, a refusal to legislate though required to do so by the Constitution; the other, the enactment and enforcement of laws which, though plainly inconsistent with constitutional provisions, have not been brought up in judicial form for the consideration of the courts, and which therefore, in spite of obvious unconstitutionality, may be operative and binding on the people for years. The check on unconstitutional legislation exercised by our courts is one of the weakest and most remote in our scheme of government.

Those who assert that it will lead to utter confusion to allow the various departments to define the limits of their respective powers overlook the relative unimportance of the judicial check in comparison with other checks provided for in written Constitutions: the restraining influence of public sentiment; and above all the actual experience of those countries whose legislation is free from judicial check. The constitutions of France and Switzerland expressly declare that the courts shall be bound by all the acts of the legislature. It may be true, as Prof. Burrage says, that illustrious European jurists and publicists are urging that the power of declaring legislative acts void for unconstitutionality be exercised by the Continental courts; yet as a matter of fact the German courts, free from the influence of precedents peculiar in



our colonial system, and having to deal with this alleged power solely as a supposed necessary deduction from the existence of a written constitution, have finally decided that the power does not exist. The Imperial Tribunal in the case of *K. v. The Dyke Board of Niedervieland* (cited in Coxe, Judicial Power and Unconstitutional Legislation, p. 99) held that a "constitutional provision that well acquired rights must not be injured is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well acquired rights."

It is not to be questioned that the judicial check on unconstitutional legislation is beneficial; that it is a more convenient and stricter check than that the people directly exercise. But it is, at the same time, to be remembered that the right to exercise this check is not to be deduced from the existence of a written constitution. The grave practical results of the decision of the German courts on this point show clearly that the question is not one of merely academic interest.

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**TACKING OF ADVERSE POSSESSIONS.** — In most jurisdictions privity of estate is regarded as essential to the tacking of adverse possessions. In view of the fact that it is a question primarily of barring the owner's right of entry, and not of bestowing title upon the last adverse possessor, the word privity has often been interpreted rather liberally. For example, in *Davock v. Nealon* (32 Atl. Rep. 675), the New Jersey court recently held that where one encloses and occupies more land than is covered by the description in his deed and sells (by the same description) to another, who enters into possession of all the land enclosed, the successive possessions may be tacked to make up the period required by the Statute of Limitations. As to the land not included in the deed, the court held that the clear intention of the parties, coupled with the actual transfer of possession, raised the required privity. The same result was reached in *McNeely v. Langan* (22 Ohio St. 32), while the opposite view was taken by the Massachusetts court in *Ward v. Bartholomew* (6 Pick. 409). Each case has a considerable following.

Notwithstanding some rather cautious statements in the opinion, it may probably now be taken as settled in New Jersey, that any voluntary transfer of possession will suffice to sanction tacking. This seems the better view. Whether or not one to whom an absolutely void conveyance has been made, and whose possession is consequently adverse to his grantor, can be said to stand in privity of title with the latter, may be only a question of words, and at any rate it is a difficulty for the New Jersey court to deal with. One who looks at the matter purely in the light of principle may well throw overboard the whole doctrine of privity, and conclude, as at least one American court has done, (see *Fanning v. Willcox*, 3 Day, 258,) that there is no logical stopping place short of holding that even successive disseisins are no break in the continuity of adverse possession, and that accordingly a disseisor, as well as a grantee, an heir, or a devisee, must be allowed the privilege of tacking. For it certainly seems in accord with the reason of the Statute of Limitations to look at the whole matter solely from the point of view of him whose right is to be barred. If he is kept out of posses-



sion continuously for the statutory period, it would appear that on principle no more need be required.

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ONE-MAN CORPORATION. — The case of *Broderip v. Salomon* (1895, 2 Ch. 323), has attracted considerable attention in England, and some adverse criticism. The facts were as follows. One Salomon, a leather dealer, appreciating the advantages of limited over unlimited liability, organized a corporation composed of himself and family, sold his business to it at an exorbitant price, and took in payment bonds secured by a floating charge on all the corporation assets, present as well as after acquired. Each of the six straw members took one share of stock; the remainder went to Salomon. In this way he virtually reserved his property, and the control and profits of the business, while shifting the liability for future debts to a pauper corporation. Perhaps this might be done if the public was fairly notified of the charge on the capital stock. But there is no registration of mortgages in England to give such a notice. As a consequence, the unsecured creditors would have found themselves out in the cold when it came to liquidation had not the court held Salomon liable to indemnify the company for the debts incurred. Several theories are suggested to support this liability, the one most prominently advanced being that the company was a trustee for the promoter vendor, and as trustee entitled to be reimbursed for liabilities incurred on his behalf. That would seem to be a question of fact, however, as it would be were Salomon held as principal. If the liability rests on fraud, it is difficult to see why Salomon alone was taken and his family left. The real grievance appears to be the lack of any registration of such mortgages, as Mr. Edward Manson, in 11 *Law Quart. Rev.*, 186, 352, points out.

Supposing, however, there were such a registration, what is the policy of general corporation acts? Do they permit one man virtually to limit his liability, if due notification is given to creditors? (11 *Law Quart. Rev.* 185.) That appears to be a question of economic policy. Under ordinary circumstances justice demands that every debtor, whether a corporation or not, pay all the debts he incurs. Limited liability is an exception, a privilege justified only so far as it gives a proper stimulus to industrial enterprise. It is doubtful if individual enterprise needs such a stimulus.

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NEW YORK CODE REVISION. — The troublesome experience of New York with the existing code of civil procedure should have been sufficient warning against ill considered methods of change; but the present course of revision in that State is more likely, one would think, to lead to further confusion, than to any reform of the inconsistencies and ambiguities that now characterize the code. After long agitation the State Bar Association secured the passage of an act which empowered the Governor to appoint a commission of three to examine codes of procedure and practice acts of other States and countries, and prepare a revised New York Code. So far, all well and good! The Governor at this stage appointed the three Commissioners of Statutory Revision to constitute the commission for revising the code. These commissioners — competent men in their department — are not shown to have any peculiar

fitness for this additional task. The advantages of codification are debatable; but once the policy is adopted, no one can question that the preparation of a code should be intrusted, as a prerequisite for its satisfactory accomplishment, to those who have a thorough familiarity with the principles and theory of the particular branch of the common law to be codified, and a specialist's knowledge of its details. Incidentally, but not so imperatively, an acquaintance with the defects and merits of existing codes is desirable. In the present case, to throw the burden of drafting a revised code of procedure on the shoulders of the commissioners—confessedly not specialists in the law of civil procedure, and already behindhand in their work of revising the statutes—is probably to repeat the history of 1877, when a similar commission of statutory revision was required to revise the procedure code. The result was that the revision of the statutes was never completed; while the procedure code is so defective and ill drawn that, rather than practise longer under it, the bar of the State now welcome the uncertainties of a new revision. It is only fair to add that the report, which the commissioners must submit December next, of the results of their examination of other codes and rules of procedure may reveal unexpected and un hoped for qualifications for the task assigned them.

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THE RULE IN *DEARLE v. HALL*.—An assignee of a *cestui's* interest in a trust fund, will, if the trustee have no notice of the assignment, be postponed to a subsequent assignee who gives notice. This, it will be remembered, is, in a word, the doctrine known to English lawyers as the rule in *Dearle v. Hall* (3 Russ. 1). The confusion which it has worked and is continuing to work in the English law of trusts is well pointed out by Mr. E. C. C. Firth in an article in the October number of the Law Quarterly Review. That the rule is devoid of principle in all cases where the second assignee makes no inquiries of the trustee, and so is not mislead by the first assignee's neglect, has often been said and seems clear enough. Whether it is consonant to principle where the second assignee does make inquiries, and takes his assignment in reliance on the trustee's ignorance of the prior assignment, is a question on which there is likely to be a difference of opinion. Mr. Firth denies the right of the second assignee even in this case, on the ground that the first owes him no duty and so is not guilty of negligence in omitting to give notice. Accordingly there can be no estoppel by negligence. It would seem, however, that a duty to give notice might very well be contended for, where a probable consequence of taking the assignment without notice is that some one will be defrauded.

The question is, of course, no longer an open one in England, where, by a series of decisions, the rule has been "improved" until now it has nothing to do with the merits of the successive assignees. *Foster v. Cockerell* (3 Cl. & F. 456) decided that it was immaterial that the second assignee made no inquiries of the trustee; *Low v. Bouverie* (1891, 3 Ch. 82) that the trustees were not bound to answer inquiries if they were made; *Lloyd v. Banks* (3 Ch. 488) that the first assignee should be preferred although he neglected to give notice, if the trustees happened by accident to hear of the assignment. Thus, in all cases where the second assignee gives notice, it has come to be essential for the trustee



to have a bit of information which he is not bound to impart to anybody which the first assignee is not bound to give him, and which the second is not bound to trouble himself about.

It is certainly not to be regretted that a rule so purely artificial and technical has, in many American jurisdictions, failed to gain a foothold. See the cases collected in Ames, *Cases on Trusts*, 2d ed., 326-328; and see also 7 HARVARD LAW REVIEW. 305.

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SHALL A NEGLIGENT PARENT RECOVER FOR A CHILD'S DEATH?—Though the authorities are still in conflict, it seems clear on principle that, where an infant sues for injuries caused by the defendant's negligence, the contributory negligence of his custodian should not be imputed to him so as to defeat his action. In jurisdictions where this doctrine is accepted a more difficult question arises. When a child is killed through the combined negligence of his parent and the defendant, and the parent, as administrator, brings action for the death of the child, being himself the sole beneficiary in case of recovery, is his contributory negligence a good defence? The courts which have been called upon to answer this question are pretty evenly divided in their answers. In the recent case of *Bamberger v. Citizens' St. R. Co.* (31 S.W. Rep. 163) the Tennessee court discusses the subject thoroughly, and comes to the conclusion that in such a case the parent's contributory negligence is a good defence to the action. *Wymore v. Mahaska County* (78 Iowa, 396) presents the opposite view. (See Tiffany on Death by Wrongful Act, §§ 69-71, for a full discussion of the subject.)

On the one hand it is urged that the action is purely in the right of the child,—his estate in fact is suing, and it should consequently recover whenever the child himself could have recovered had his injuries not proved fatal. At first sight this seems the strictly logical view. On the other hand, it must be remembered that the right of the administrator to bring this action is not a common law right, but is purely statutory. The statutes, of which every State has one, are copied more or less closely from Lord Campbell's Act, and ordinarily provide, in substance, that where the deceased could have recovered if he had lived, his administrator can recover for the benefit of the next of kin; and the courts which support the view taken in the Tennessee case add the qualification that, as the next of kin is the real party in interest, he must have been free from fault himself in order to reap the benefit provided for by the statute. This works justice, but is it reading too much into the statute? It hardly seems so. It is by no means uncommon in statutory actions for damages for courts to hold that contributory negligence is a good defence, though not mentioned in the statute. (See *Quimby v. Woodbury*, 63 N. H. 370.) And in the case under discussion it would apparently do no violence to the intention of the legislature to interpret the statute as not merely providing for the survival of the child's right of action, but as giving the next of kin a new right of a special nature, the enforcement of which is conditioned on freedom from contributory negligence. This interpretation supports Mr. Tiffany's conclusion that the right of the deceased to maintain an action is not the sole test of the right of the beneficiaries to recover damages for his death, but merely one of the conditions of their right.



## RECENT CASES.

**BANKS AND BANKING — NEGLIGENCE IN SUPERVISION OF BANK OFFICER.** — Where a special deposit for gratuitous safe-keeping was made with a bank and stolen by its cashier, *held*, that the bank was not discharged from liability if negligent in retaining the cashier when it ought to have known that he had become unworthy of trust. *Merchants' National Bank v. Carhart*, 22 S. E. Rep. 628 (Ga.).

If a bank official undertakes to act in a manner which is *ultra vires* of the corporation, his act will not bind the corporation or furnish a cause of action against it. *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532. A bank must use ordinary care, however, in the gratuitous keeping of a special deposit, and the fact that due care has been exercised in procuring a servant in the first place is no reason why diligence should cease in regard to him. *Gilman v. Railroad Corporation*, 10 Allen, 233. The decision seems sound, therefore, and is supported by such meagre authority as there is on the subject. *Scott v. National Bank*, 72 Pa. St. 471.

**BILLS AND NOTES — BONA FIDE PURCHASER — NOTICE.** — The payee of a note fraudulently procured from the defendant, indorsed it to the plaintiff for valuable consideration, in violation of an agreement not to convey. The plaintiff had notice of the agreement, but not of the fraud. *Held*, that the plaintiff could recover on the note. *Thompson v. Love*, 32 S. W. Rep. 65 (Ark.).

It is difficult to say on what ground the court put this decision, but the right result seems to have been reached. If the agreement were oral and simultaneous with the giving of the note, it would probably be inadmissible as varying the effect of the writing; this would dispose of the matter at once. But if the agreement were in writing, or made subsequently for good consideration, the case would be more doubtful. Even such an agreement, however, would not affect the validity of the note, and a breach of it would result only in the personal liability of the promisor. It seems equally clear that no notice of the fraudulent procurement of the note could be imputed to the indorsee because of his knowledge of the agreement.

**BILLS AND NOTES — STATUTE OF LIMITATIONS.** — Where, for thirteen years, no demand was made upon a promissory note payable thirty days after demand, *held*, since it did not appear that the parties intended to limit the time within which presentment should be made, the holder of the note was not barred from suit against the maker. *Cooke v. Pomeroy*, 32 Atl. Rep. 935 (Conn.).

Action does not accrue upon a note payable a certain number of days after demand until demand is actually made. Until such time, then, the Statute of Limitations cannot begin to run against it. There are some authorities which hold that the demand must be made within a reasonable time, which is ordinarily fixed at the period allowed by statute for suing on a note payable at the time of its date. *Palmer v. Palmer*, 36 Mich. 487. The court here errs in attempting to distinguish those cases on the ground of extrinsic evidence, for where they do not refer exclusively to the discharge of an indorser, they are clearly wrong. *Wenman v. Mohawk Insurance Co.*, 13 Wend. 267.

**CARRIERS — BILL OF LADING — DEFICIENCY IN THE CARGO.** — Action by the assignee of the consignor of grain by defendant's vessel on the following bill of lading. "All the deficiency in cargo to be paid for by the carrier. . . and deducted from the freight." On the vessel's arrival at the port of destination it was ascertained that some 2,000 bushels less than supposed were on board, the deficiency being due to a mistake in the weighing at the port of departure. *Held*, that the carrier was liable for the shortage in the cargo though the grain had never actually been loaded on board the vessel. *Sawyer v. Cleveland Iron Min. Co.*, 69 Fed. Rep. 211.

Where the case arises between the carrier and a consignee, the bill of lading and facts being otherwise similar to those set out above, the consignee is allowed to recover. "Otherwise," says the court in *Merrick v. Certain Wheat*, 3 Fed. Rep. 34, "there would be no necessity for inserting the stipulation at all, because the consignee, without any express stipulation, has the right to deduct from the freight a deficiency in the cargo actually received by the carrier and arising from his fault. . . and it is not reasonable to suppose the parties meant to insert a useless condition in the contract." The court in the present case thought the same rule applicable to a consignor, as no evidence showed the consignor was privy to the mistake, he being entirely unrepresented at the weighing in question except by the carrier, and so in the same relative position in this respect as a consignee would be as to the carrier. If the consignor could have recovered, then his assignee, the plaintiff, can recover.

**CONSTITUTIONAL LAW—EXEMPTION OF VETERANS FROM CIVIL SERVICE RULES.**—The Constitution of New York, Art. 5, § 9, provides that appointments in the civil service shall be made according to fitness, which shall be determined so far as is practicable by competitive examination; but veterans shall be entitled to preference without regard to their standing on any list from which such appointment may be made. *Held*, a statute providing that when a veteran is an applicant competitive examinations shall not be deemed practicable if the salary of the position does not exceed \$4 per day, but that the only examination shall be one to test the ability of the applicant to fill the position, is unconstitutional and void. *In re Keymer*, 35 N. Y. Supp. 161.

The provisions of the New York statutes in regard to veterans in the civil service were gradually relaxed from 1883 to 1894, when the legislature declared that the civil service laws should not apply at all in cases where the compensation did not exceed \$4 per day. This statute has been abrogated by the new Constitution (*In re Sweetley*, 33 N. Y. Supp. 369), the provisions of which in regard to the preference of veterans are very similar to those of the law which was passed by the Massachusetts legislature last June over the Governor's veto. Acts of Mass., 1895, chap. 501. The court says that the power to declare examinations impracticable in one case implies the power to declare them impracticable in every case, and thus to annul the whole constitutional provision. The judgment of the lower court awarding a mandamus to the Commissioners to give the orator a non-competitive examination is accordingly reversed.

**CONSTITUTIONAL LAW—FEDERAL COURTS—FOLLOWING STATE DECISIONS—CHANGE OF RULING.**—A federal court made a decision respecting the rights of parties before it in certain property, based upon a series of decisions of the highest court of a State, as to the interpretation of a statute of such State, and the decision was affirmed upon appeal. In a later case respecting the identical property, the State court reversed its former decisions. *Held*, this fact does not make it the duty of the federal court to reverse its decision as to the rights of the parties in the same property, in proceedings subsequently arising. *National Foundry & Pipe Works v. Oconto Water Co.*, 68 Fed. Rep. 1006.

The court says (though the decision of the case does not require it) that "it will doubtless be proper for this court, in any case hereafter arising, where rights have accrued subsequent to the last decision of the Supreme Court of the State upon the question, to give due consideration to the later rulings of that tribunal." This would seem to be sound, though no cases in which this additional step has been taken, have been called to our attention. The decision is in accordance with authority. *Burgess v. Seligman*, 107 U. S. 20. A note at page 34 collects the principal cases bearing upon the subject.

**CONSTITUTIONAL LAW—PUBLIC USE—IRRIGATION.**—An act of California allowed fifty landholders, whose lands were susceptible of a common system of irrigation, to submit a plan of irrigation for the whole common district, which plan, if accepted by two thirds of the landholders of the district, was to be binding. To meet expenses, all the lands of that district could be assessed, and for failure of payment, sold. The landowners could be heard only on the question of valuation. The act was *held* unconstitutional. *Bradley v. Fallbrook Irrigation District*, 68 Fed. Rep. 948.

The court objects to this as a taking of property for other than a public use, on the ground that the landowners of the district were the only persons benefited. But it is difficult to distinguish this from such cases as *Hagar v. Reclamation District*, 111 U. S. 701, where a similar act to drain swamp lands was upheld. It is not merely a question of the public health; the legislature may provide also for other phases of the public benefit, and it would seem that the turning of large tracts from deserts into gardens was a suitable field for such legislative consideration. This view was taken in a recent case in Nebraska, which held that the taking of land for purposes of irrigation lay within the discretion of the legislature. *Paxton Irrigating Co. v. Farmers' Irrigation Co.*, 64 N. W. Rep. 343 (Neb.).

From another aspect, too, it is proper for the legislature to interpose a controlling hand. The irrigation necessary to improve these lands could only be accomplished by the co-operation of all the landowners, and it has been laid down that the legislature has a power "to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which by reason of the peculiar natural condition of the whole tract cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful at their joint expense." *Wurts v. Hoagland*, 114 U. S. 613. The court, in fact, seems to admit this view, and goes off to discuss the case on another ground.



**CONTRACTS — ACCORD AND SATISFACTION — EXECUTORY ACCORD NOT ENFORCEABLE.** — Plaintiff and defendant made a contract for the delivery of lumber on May 20, 1889. After partial execution disputes arose, and on December 30 a new contract was made modifying the old one, but it was not executed. Plaintiff sued on old contract. *Held*, that new contract was an accord that did not discharge the old one until performance. *Crow v. Kimball Lumber Co.*, 69 Fed. Rep. 61.

Whether one contract can be discharged by the substitution of another is said to depend on whether the parties intend the new agreement or its performance to be the consideration for the release of rights under the old one. This is no doubt true, but when the new agreement, as in the present case, offers no reliable clue to the intent of the parties, which will they be presumed to intend? When the second contract contains mutual promises to do acts other than merely forbearing to exercise rights given by the old contract, it would seem that the presumption should be in favor of an intent to substitute the new agreement, not its performance, for the old one. Clearly both contracts are not meant to be carried out, and by the new one *both* parties have promised to do acts inconsistent with the old one. It is therefore hardly reasonable to suppose they mean to wait till performance on either side before abandoning the old contract. Where only one party makes a new promise, and the other merely agrees to forbear, it may be reasonable to suppose that the execution of the promise, not its giving, is the consideration. Compare *Babcock v. Hawkins*, 23 Vt. 561; *Morehouse v. Bank*, 98 N. Y. 503; *Christie v. Craigie*, 20 Pa. St. 430.

**CONTRACTS — DEFENCE OF ILLEGALITY.** — Plaintiff declared on defendant's mortgage note. Defendant pleaded that plaintiff, in loaning the money held by him as county treasurer — the consideration for defendant's note — committed the crime of embezzlement under R. S. Indiana, 1894, § 2019. Plaintiff demurred. *Held*, overruling plaintiff's demurrer, (1) the record does not disclose any interest of the county in this action; (2) plaintiff having committed a crime in giving the consideration, is thereby precluded from recovering for his own benefit. *Winchester Light Co. v. Veal*, 41 N. E. Rep. 334 (Ind.).

It is a well recognized legal principle that a statute ought not to operate to the detriment of those whose interests it was aimed to protect. On this principle, in the present case, if the county appears from the facts stated in the record as interested in the outcome of this action, plaintiff's demurrer should be sustained. *Bowditch v. Ins. Co.*, 141 Mass. 292. From the facts stated in the pleadings it is clear that the county had a right to regard plaintiff as trustee of the note for the county. For aught that appears on the record this right of the county in the note continues in existence; if so, the county has an interest in this action. It would therefore seem that the plaintiff should have prevailed on his demurrer.

**CONTRACTS — PUBLIC POLICY.** — In accordance with a Resolution of the Massachusetts Legislature, the Governor and Council employed the agent of the Commonwealth for the prosecution of war claims against the United States, to prosecute the claim of the Commonwealth for a refund of the direct tax paid the United States in 1861. Plaintiff held the office named, and consequently was appointed. His compensation was to be two per cent of any amount he should collect, to be paid out of the proceeds received therefrom. By the efforts of himself and similar agents from other States, an act was passed providing for the refunding of the direct tax. *Held*, petitioner could recover from the Commonwealth. *Davis v. Commonwealth*, 41 N. E. Rep. 292 (Mass.).

The question of public policy is always a broad one. Such a contract is that set out above, if made between two individuals, would, according to the trend of authorities, be void as against public policy. *Trist v. Child*, 21 Wall. 441. But the legislature can regulate public policy. They are the representatives of the people. As the court says, "The legislature can determine for itself what public policy requires or permits to be done in the prosecution, in any form of claims of the Commonwealth against the United States." The resolution was not passed to favor Davis. It was enacted for the good of the people of Massachusetts, and as it was necessary to pay some one to aid in the passing of the refunding law, the case does not seem to be one in which the legislature cannot legally pass an act setting aside the general law. At all events, as the legislature had sanctioned the contract made between the Governor and Council and the petitioner, and as it had a right to provide for the compensation of its own agents, the court could not, as a judicial body, declare the contract void.

**CONTRACTS — RECOVERY ON ULTRA VIRES CONTRACTS — RES JUDICATA.** — Contract for money paid without authority of plaintiffs to defendants by a joint manager of plaintiff and defendant. Defendant contended, (1) that the contract which gave rise to the payment was *ultra vires*; (2) that the plaintiff had sued defendant on this claim in the court below, and was estopped by the judgment of that court in his favor to raise



the question. *Held* by a majority of the court, that, as the present had formed one of three distinct claims in the lower court, and neither its record nor the defendant's answer in the present case showed that it had been adjudicated there, the judgment was no estoppel, and that as all agreed that the fact of the contract being *ultra vires* was no bar to the plaintiff's claim, he ought to recover. *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 41 N. E. Rep. 268 (Mass.).

That such a claim as the present is not barred by the fact that plaintiff corporation acted *ultra vires* is well settled. The recovery should be in quasi contract, and not on the contract itself, as it is illegal. In the first form of action the law implies a promise, and so the illegal contract is not put in question. Keener on Quasi Contracts, p. 272, note 1. Whether the claim is barred by a previous judgment, in which it formed one of three distinct issues, is a more difficult question, and was the one on which the court differed. The majority seems to think that the defendant should show that the claim was not adjudicated below. But why should the burden of establishing this be on defendant? The judgment of the court below raises at least a *prima facie* case against plaintiff's claim, and, if it does not entirely estop him from showing that it was not adjudicated there, it at any rate puts on him the burden to show it was not. *Paine v. Ins. Co.*, 12 R. I. 440. The opinion of the majority of the court is open to doubt on this point, even if one does not feel inclined to go as far as Mr. Justice Holmes, who, in dissenting, remarks, "When the pleadings present three distinct issues, and the final decree is for the plaintiff in two of them and is silent as to the third, it has the same effect with regard to that issue as if it had been expressly for the defendant." *Goodrich v. Yale & Allen*, 454; *Schmidt v. Fahensdorf*, 30 Ia. 498.

CONTRACTS — STOCK GAMBLING — RECOVERY OF SECURITIES. — Plaintiff and defendant had entered into a contract by way of wager on the differences of tape prices of stocks. As security for payment the plaintiff deposited certain shares, and for the recovery of these this action is brought. The defendant relied on the following clause in the Gaming Act of 1845: "No suit shall be brought . . . for the recovery of any valuable thing . . . deposited in the hands of any person to abide the event on which any wager shall have been made." *Held*, that this clause applies only to deposits to which the happening of the event is to determine the title; that the securities are not of such a nature, and may be recovered. *Strachan v. Universal Stock Exchange Limited*, [1895] 2 Q. B. 329.

This decision seems sound and to accord with the rule allowing recovery of deposited stakes when depositor has repented and demanded the wager of the stakeholder before the happening of the event. The ground of the decision in both cases is that it does not aid or affirm an illegal contract, but arrests it.

CORPORATIONS — FLOATING SECURITY — SUBSEQUENT MORTGAGE OF CHARGED ASSETS. — The defendant railway company issued a set of debentures, and, as floating security for the payment of interest thereon, charged all its property, present and future. A condition provided that "notwithstanding the said charge the company shall be at liberty to use, sell, or otherwise deal with any part of its property until default shall be made in the payment of interest for three calendar months." After an instalment of interest had fallen more than three months in arrear, the company mortgaged a part of its assets to secure the payment of a new set of bonds then issued. The plaintiff on behalf of the debenture holders brought this action to enjoin the payment of the money on the bonds. *Held*, by the Court of Appeal, reversing decision of North, J., that after the expiration of the three months the security still remained floating and the assets at the disposal of the company until some action was taken by the debenture holder to enforce the security. The bondholders therefore had priority, the mortgage having been in trust for them. *Government Stock Investment and other Securities Co. v. Manila Ry. Co.*, [1895] 2 Ch. 551.

The reversal of the decision of North, J., seems to have rested altogether on a mere difference of interpretation. North, J., was of opinion that, the charge as floating security being not enforceable until interest was three months in arrear, the proper inference was that at the end of that period it became a fixed charge without any action on the part of the debenture holders, and so granted the decree prayed for. The view entertained by the Court of Appeal would seem to be the sounder.

CORPORATIONS — POWERS OF A CITY IN REGULATING THE PRICE OF GAS. — In 1886 the city of Iola granted to the Iola Gas and Coal Co. the right to lay pipes, etc., and to supply the city with gas. No rates were prescribed. In 1889 the company assigned all its rights and interests to Pryor and Paullin. In 1895 the city passed an ordinance making it unlawful for any person or firm to charge for gas anything in excess of certain prices specified in the ordinance. *Held*, that said ordinance is inoperative and void as to Pryor and Paullin, in so far as it purports to establish prices

for gas furnished by them to private consumers. *In re Pryor*, 41 Pac. Rep. 958 (Kan.).

There is some conflict of opinion as to whether even the legislature, having once granted a franchise, may thereafter step in and assume to regulate prices. See *Spring Valley Water Works v. Schuttler*, 110 U. S. 347. Where the legislature has reserved this power, it has been held that it may by express terms delegate it to a municipal corporation. *State of Ohio v. The Cincinnati Gas Light Co.*, 18 Ohio St. 263. The precise question presented by the principal case has arisen in but few instances. The decision seems manifestly correct. The case decides that, by common law, a municipal corporation has no power to regulate prices, nor has it any such power implied from the legislature under a general statute providing that gas and water companies shall be subject to such regulations as the municipal authorities shall prescribe. *City of Rushville v. Rushville Gas Co.*, 132 Ind. 575, is directly *contra*, but that case has been overruled by *Lewi ville Gas Co. v. The State*, 135 Ind. 49, which is in accord with the decision in the principal case. See also *City of St. Louis v. Bell Telephone Co.*, 96 Mo. 623, *accord*.

CRIMINAL PROCEDURE — EXCESSIVE SENTENCE — HABEAS CORPUS — JURISDICTION. — Petitioner was sentenced to imprisonment for five years for a crime for which the court had no authority to impose a sentence in excess of two years. He applied for a writ of habeas corpus. *Held*, that, when a court had jurisdiction of the person and the offence, the imposition of an excessive sentence was not an act without its jurisdiction which could be attacked by habeas corpus if the legal part of the sentence was separable from the excess; but was merely an error which as to the excess should be corrected by writ of error. *In re Taylor*, 64 N. W. Rep. 253 (S. Dak.).

Like *United States v. Harmon*, 68 Fed. Rep. 472, (noted in 9 HARVARD LAW REVIEW, 220), this case and the authorities collected therein show the unmistakable drift of the courts toward freeing the criminal law from some of the technicalities that serve only to hinder justice. There is no good reason why a man fairly convicted of crime should be released altogether because he receives too heavy a sentence, when there is the alternative of re-sentencing him for the proper term. The weight of authority, composed largely of very recent decisions, is now with the principal case, the growth of opinion in the U. S. Supreme Court being clearly traceable from the strong contrary dictum in *In re Graham*, 138 U. S. 461, through *Re Bonner*, 151 U. S. 242, to the opposite decision in *U. S. v. Pridgeon*, 153 U. S. 48.

CRIMINAL PROCEDURE — IRREGULAR VERDICT — DOUBLE JEOPARDY. — Defendant was indicted for grand larceny, and when the jury retired they were told to send for the judge if they arrived at a verdict during the recess of the court. Instead of doing this, the jury, when they reached a decision, sealed their verdict, gave it to the clerk of the court, and separated. When the court reconvened, the judge assembled the jury in their box, opened and read the verdict in their presence and hearing. On exception to the court's refusal to discharge the defendant for this irregularity an appeal was taken. *Held*, that the writing delivered to the clerk in the absence of judge and defendant was no verdict, and its acceptance by the judge followed by an unauthorized discharge of the jury was equivalent to an acquittal of the defendant, who could not be placed in jeopardy a second time. *Hayes v. State*, 18 So. Rep. 172 (Fla.).

It is well settled that the discharge of a jury, except in case of necessity, when the indictment is valid and the defendant objects, bars any further trial. But the weight of authority seems also to hold that a verdict rendered in the absence of the prisoner, while entitling him to a new trial, does not discharge him. *State v. Hughes*, 2 Ala. 102; *Rose v. State*, 20 Ohio St. 31; *People v. Perkins*, 1 Wend. 91; *Sneed v. State*, 5 Ark. 431. If the above decision is right, it must be on the narrow ground that, because the jury were not expressly authorized to deliver a sealed verdict, their written decision was absolutely void, and the judge's failure to poll them afterwards left the case without a verdict from them, though they expressed no dissent when their written opinion was read in open court. In *Nomaque v. People*, 1 Breese, 145, 12 Am. Dec. 157, a similar point was decided differently.

EQUITY — MORTGAGE OF FUTURE CROPS. — A lease of farm lands contained a proviso that the property in the crop should be in the lessor until a portion of it had been paid in as rent, and until the farm hands were paid. Before the crop was sown, it was mortgaged to defendant; when grown, it was put in possession of plaintiff, an unpaid farm hand, who was to satisfy his lien, pay the rent, and return the surplus to the lessee. In an action of trover, *held* for defendant. *Lawrence v. Phy*, 41 Pac. Rep. 671 (Or.).

A clear case of a prior mortgage being preferred to a later lien, even though the



subject matter in dispute was not a legal interest, but merely the lessee's equitable claim. It is worth remarking, however, that this was a mortgage of future crops which were to come from the land leased by the mortgagee.

**EVIDENCE—ACTION FOR DEATH OF EMPLOYEE—VERBAL REPORT OF FOREMAN.**—At the trial of an action by an administratrix against a corporation to recover damages for the death of her husband, the defendant questioned its superintendents regarding verbal reports made to him by a deceased foreman as to the condition of the works where plaintiff's intestate was employed. This testimony was admitted. The court said, "If it was customary for the subordinate to go and report at any time in the day verbally, the witness, if acquainted with what that report was, could testify as to it." *Williams v. Walton & Whann Co.*, 32 Atl. Rep. 726 (Del.).

From the nature of the subject, the authority upon this point is meagre. The above ruling would seem to accord with that exception to the rule against hearsay which admits oral statements made in the course of duty by a deceased person, a doctrine which originated in a dictum of Lord Campbell in the *Sussex Peerage Case*, 11 Cl. & Fin. 113, and which is now considered as established in England. With the exception of the principal case, no American ruling upon the subject has been called to our attention. The admission of such evidence in this case may prove to be a step toward the adoption by our courts of the English doctrine.

**EVIDENCE—POST-TESTAMENTARY DECLARATIONS.**—Bill to set aside a will. Both parties admitted the execution of a will, but plaintiff contended that the genuine will had been destroyed, and that the one in court was a forgery. The latter gave defendant a fee simple in certain land, the former, as was alleged, gave defendant only a life estate with remainder to the plaintiff. In order for the plaintiff to be allowed to contest the will, he had to show that he was interested in the estate; for this purpose he introduced declarations made by the testator shortly before his death, stating the contents of the will as alleged. The evidence was admitted. *McDonald v. McDonald*, 41 N. E. Rep. 336 (Ind.).

The court cites a list of authorities to show that declarations of a testator are admissible to prove the contents of a lost will. The furthest extent to which these authorities appear to go, however, is that post-testamentary declarations are admissible to prove the contents of a lost will only when corroborative of other evidence. *Sugden v. Lord St. Leonards*, 1 Pr. Div. 154; but see *Woodward v. Goulstone*, 11 App. Cas. 469. In the principal case there was no other evidence of the contents. The decision might possibly stand as an extension, admitting such evidence where proof of contents was merely collateral to the issue; but it is difficult to see why the purpose for which a fact is used should alter the mode of its proof.

**GARNISHMENT—COUNTY AND MUNICIPAL CORPORATIONS NOT SUBJECT TO GARNISHMENT.**—*Held*, that a board of county commissioners is not subject to garnishment under a statute which makes any "person" liable, and which further states "person" to include corporations. The case is rested on *Stermmer v. Board of Com'rs*, 38 Pac. Rep. 839, where a county board is held to be only a quasi corporation. *Gann v. Cribbs et al.*, 41 Pac. Rep. 829 (Col.).

That a municipal corporation is not subject to garnishment has been held in the recent case of *Leake et al. v. Lacey*, 22 S. E. Rep. 655 (Ga.). The ground of public policy stated in the latter case seems the true reason for such decisions as these, the court often straining the text of a statute under the impression that it is for the public benefit that those contracting to do public works shall not have the necessary supply of money cut off by garnishment while in the hands of the public corporation for which they work.

**JUDGMENTS—VALIDITY—DISQUALIFIED JUDGE.**—*Held*, the effect of a statute providing that "no justice of the peace shall sit in any cause when he may be interested or where he may be related to either party within the third degree," is to deprive a justice of the peace of all jurisdiction of such causes; judgment entered by a justice in such cause is void, and he is liable in damages for property seized under it. *McVea v. Walker*, 31 S. W. Rep. 839 (Tex.).

A substantially similar statute to that involved in the principal case is to be found in many States, but the courts of the different jurisdictions are not agreed as to the effect to be given to it. According to one view, the judgment of a judicial officer sitting on the cause of a relative in contravention of the statute is merely voidable, and consequently not open to collateral attack; according to the other view, such judgment is absolutely void. The former view is upheld in *Black on Judgments*, § 174, the latter in *Freeman on Judgments*, § 146, and in *Cooley on Torts*, 421. The different jurisdictions appear to be pretty evenly divided on the question. See authorities collected in the references.

**PARTNERSHIP — SET-OFF OF A PERSONAL DEBT OF ONE PARTNER.**—A partnership was owed by the estate of a deceased person the sum of \$40,604.55. A member of the partnership, Thomas H. Allen, owed the estate \$38,678.28, a debt growing out of his acts as executor of said estate. *Held*, that Allen could set off a personal judgment for that sum against himself in favor of the estate against the indebtedness of the estate to the firm. *Nugent et al. v. Allen et al.*, 32 S. W. Rep. 9 (Tenn.).

As a rule, a debt which is owed by one of the members of a firm cannot be set off at law against a debt owing to the firm. There are exceptions to this rule, however. One exception is that if the parties have agreed expressly or impliedly that a debt owing by one of them can be set off against a debt owing to the firm, effect will be given to that agreement and the case taken out of the general rule. 1 *Lindley on Partnership*, \*294; *Rogers v. Batchelor*, 12 Peters, 221. The principal case falls within this exception, as the court thought that Thomas H. Allen had, if not express, at any rate implied authority to set off the two debts.

**PLEDGE — CONVERSION — TORTIOUS SALE BY PLEDGEE.**—A pledgee made a tortious sale of his pledge; no tender of the indebtedness had been made. *Held*, the tortious sale by the pledgee gives the pledgor right to immediate possession, and he may maintain trover without making tender of the indebtedness. *Waring v. Gaskill*, 22 S. E. Rep. 659 (Ga.).

The opinion here handed down does not discuss the authorities bearing on the point decided, nor does it disclose the reasoning on which the decision is based. This is the more to be regretted because the cases *contra*, *Donald v. Suckling*, L. R. 1 Q. B. 585, and *Halliday v. Holgate*, L. R. 3 Exch. 299, are cited by the text-books without disapproval. The reasoning of the English cases is, that a sale or a repledge for a larger amount, though a tortious act, does not terminate the pledgee's interest in the pledge, i. e. does not give the pledgor a right to immediate possession; the pledgor has not such right to immediate possession until tender of the indebtedness, and until he has such right he cannot maintain trover. In *Whitaker v. Sumner*, 20 Pick 399, *Balt. Ins. Co. v. Dalrymple*, 25 Md. 269, at 306, *Bukely v. Welch*, 31 Conn. 339, and *Stearns v. Marsh*, 4 Denio, 227, at 231, a misuser of the pledge was held to give the pledgor right to immediate possession. The doctrine of these cases is, it is submitted preferable to the English view; the contract is interpreted as by implication of law giving the pledgor a right which in the ordinary case of pledge, as it seems to us, every pledgor would require and every honest pledgee would willingly concede, if their attention were directed to this point at the time of making the contract of pledge. In accord with the principal case see the dissenting opinion of Mr. Justice Williams in *Johnson v. Sear*, 15 C. B. (N. S.) 330.

**PROPERTY — LANDLORD AND TENANT — IMPLIED CONDITION OF FITNESS FOR HABITATION.**—Where one hires furnished lodgings, there is no implied agreement that they shall continue habitable throughout the term, and therefore, when the family of the lessor becomes infected with scarlet fever which is communicated to that of the lessee, the latter cannot recover from the former medical expenses thereby incurred. *Sarson v. Roberts*, [1895] 2 Q. B. 395.

There is in general no implied covenant on the part of a lessor that the premises are fit for habitation, nor that he will make any repairs during the term. An exception has been laid down in the English courts to the effect that in a lease of a furnished house or of apartments there is a warranty that the premises are reasonably inhabitable and if they are not so the tenant may quit without notice. *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Finch-Hatton*, L. R. 2 Ex. D. 336; *Bird v. Lord Greville*, 1 C. & E. 317. These cases have been questioned in the United States, and even in England the exception has never been extended far enough to imply a warranty that the premises shall remain in tenantable condition throughout the term. See *Howard v. Doolittle*, 3 Duer, 464; *Dutton v. Gerrish*, 9 Cush. 89.

**PROPERTY — STATUTE OF LIMITATIONS — ADVERSE POSSESSION.**—A landowner, in the belief that his land extended to a certain line, occupied up to such line and cultivated the land as his own for more than the statutory period of limitation. In fact, a part of the adjoining section was included within the line, but he never intended to claim more than rightfully belonged to him. *Held*, that the possession was not adverse. *Davis v. Caldwell*, 18 So. Rep. 103 (Ala.).

This is a step back by the Alabama court, and is to be regretted. The doctrine here laid down finds support in the case of *Brown v. Cockerell*, 33 Ala. 38, cited in the opinion, but is almost nullified by the later decision in *Alexander v. Wheeler*, 69 Ala. 332, *so cited*. The courts of Kansas, Iowa, Maine, and one or two other jurisdictions, have reached the same result, but the current of authority is against it and it seems indefensible on principle. The fallacy arises from laying too much stress upon



the fact that if the mistake were known, no claim of title would be made, and too little upon the fact that in truth the claim is made. A convincing statement of the correct view may be found in *French v. Pearce*, 8 Conn. 439, and *Seymour v. Carli*, 31 Minn. 81.

PROPERTY — TACKING OF ADVERSE POSSESSIONS. — *Held*, that where one encloses and occupies more land than is covered by the description in his deed, and sells by the same description to another, who enters into possession of all the land enclosed, the successive possessions may be tacked to make up the period required by the Statute of Limitations. *Darock v. Nealon*, 32 Atl. Rep. 675 (N. J.). See NOTES.

QUASI CONTRACTS — FALSE REPRESENTATIONS — SURVIVAL OF ACTION AGAINST EXECUTOR. — Where a woman induces a man to marry her by falsely representing herself as a single woman, his only remedy is an action of tort for the personal injury, and no action will lie against her executor on the theory of a quasi contract. *In re Payne's Appeal*, 32 Atl. Rep. 948 (Conn.).

It is well settled that where a man falsely represents himself as unmarried, and thereby induces a woman to marry him, an action for deceit will not survive against his personal representative. *Price v. Price*, 75 N. Y. 244; *Grimm v. Carr*, 31 Pa. St. 533. Whether an action for services will survive on account of the unjust enrichment of the estate of the wrongdoer must be considered an open question. The Supreme Court of Massachusetts, influenced perhaps by the analogy of those cases in which it has been laid down that a dissee cannot maintain a suit in assumpsit for mesne profits against a disseisor until he recovers the real estate by ejectment, has decided that a woman cannot sue an administrator to recover the value of services rendered to her husband's estate under the belief that she was his lawful wife, although this belief is solely induced by the husband's fraudulent misrepresentations. *Cooper v. Cooper*, 147 Mass. 370. The Connecticut court accepts this line of reasoning. The contrary view is maintained in *Higgins v. Breen*, 9 Mo. 497, and *Fox v. Dawson*, 8 Martin, 94. There would seem to be small difficulty on principle in allowing a recovery to the extent to which the estate of the tortfeasor has been benefited. The fraud of the deceased has caused the ignorance of the facts, and if the injured party chooses to ignore the personal injury and sue for the unjust enrichment, he should be allowed to do so. Keener on Quasi Contracts, p. 321 *et seq.*

SALES — FACTORS ACTS. — *He'd*, that the word "sale" in Massachusetts Factors Act does not include a completed sale, and that where there is larceny there can be no "entrusting" within the meaning of the act. *Prentice Co. v. Page*, 41 N. E. Rep. 279 (Mass.). See NOTES.

SALES — WHEN TITLE PASSES. — C., a hotel proprietor, ordered of plaintiff two settees to be manufactured by the latter; when finished plaintiff delivered them to C. There was no agreement as to the time of payment. C. before paying plaintiff sold to defendant, and plaintiff brought replevin against defendant. The presiding justice in his instructions practically directed a verdict for plaintiff. Defendant brings exceptions. *Held*, sustaining exceptions that the presumption is that the parties intended to make payment and delivery concurrent conditions. If vendor waives the condition of payment, title vests in the vendee; delivery without payment is evidence of a waiver, and it should be left to the jury whether there was such a waiver. *Geo. IV. Merrill Furniture Co. v. Hill*, 32 Atl. Rep. 711 (Me.).

The decision itself is undoubtedly correct, but the language of the court is, to say the least, loose. The error is in regarding the payment as presumably a condition precedent to the passing of title, when it is only a condition precedent to delivery, and a waiver of it has no effect on title. In case of goods to be manufactured, presumably title passes upon appropriation and acceptance. *Wilkins v. Bromhead*, 6 M. & G. 963; *Smith v. Edwards*, 156 Mass. 221. Some authorities seem to say that title passes as soon as the things are finished. *Goddard v. Binney*, 115 Mass. 450; 2 Kent's Comm. \*504. A condition may go either to title or to delivery, but even where it goes to title, if the goods are put into the hands of the buyer, it seems a sound doctrine that there is presumably a waiver of the condition, *Upton v. Sturbridge Cotton Mills*, 111 Mass. 446; *Haskins v. Warren*, 115 Mass. 514; *Comer v. Cunningham*, 77 N. Y. 391. The doctrine that in a cash sale presumably title does not pass till cash is paid, *Paul v. Reed*, 52 N. H. 136. (a doctrine denied by Blackburn so far as mercantile transactions go,) is generally applied where the contract is for the sale of specific goods, rather than of goods to be manufactured.

TOR'S — DEATH BY WRONGFUL ACT — CONTRIBUTORY NEGLIGENCE OF SOLE BENEFICIARY. — *Held*, that where a father sues as administrator to recover for death

of child, and he is sole beneficiary, his contributory negligence is a good defence. *Bamberger v. Citizens' St. R. Co.*, 31 S. W. Rep. 163 (Tenn.). See NOTES.

**TORTS—UNFAIR COMPETITION—FRAUDULENT SIMULATION.**—Declaration that defendant in adopting a particular style of wrapper and in labelling his wares "Thedford & Co.'s Black Draught," intended to and did trick the public into buying defendant's medicine in the belief that they were purchasing a medicine of plaintiff's manufacture which was put on the market in similar wrappers, and labelled "Thedford's Black Draught." Defendant demurred. *Held*, overruling the demurrer, a plaintiff has a right of action against a defendant who intentionally tricks plaintiff's customers into buying defendant's wares in the belief that they are of plaintiff's manufacture. *Thedford Medicine Co. v. Curry*, 22 S. E. Rep. 661 (Ga.).

The principle here applied is not a new one, nor even a new application of an old principle. It is the same principle and the same application of it by virtue of which the common law protected the use of trademarks before their use was protected by statute. Lord Blackburn in *Manufacturing Co. v. Loog*, 8 Appeal Cases, 15, at 29, 30. Plaintiff's right which defendant has violated is not a right to the exclusive use of a particular name or a particular kind of wrapper for his wares; "his right is to be protected against fraud, and fraud may be practised against him by means of a name, though the person practising it may have a perfect right to use that name provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." Lord Langdale in *Croft v. Day*, 7 Beav. 84, at 88. This principle and its application to cases not distinguishable from the principal case are well established in England and America. *Perry v. Truefett*, 6 Beav. 66; *Blofield v. Payne*, 4 Barn. & Ad. 410; *Sykes v. Sykes*, 3 B. & C. 541; *Lee v. Haley*, 5 Ch. Appeals, 155; *Stone v. Carlan*, 13 Law Reporter, 360; *Nail Co. v. Bennett*, 43 Fed. Rep. 800; *Manufacturing Co. v. Manufacturing Co.*, 138 U. S. 537, at 549. See also 4 HARVARD LAW REVIEW, 321; 5 HARVARD LAW REVIEW, 139.

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## REVIEWS.

**THE MIRROR OF JUSTICES.** Edited for the Selden Society by William Joseph Whittaker, with an Introduction by Frederic William Maitland. London, 1895.

The chief value of this publication is the proof it gives that the "Mirror" is valueless. This book had been freely cited by Coke and other lawyers of the sixteenth and seventeenth centuries; and Judge Gray not long ago considered at length an extract from it in the very important case of *Briggs v. Light Boats*, 11 All. 157. It is therefore well worth while to have its unreliability established; and that this is done will appear from the following statements in the Introduction: "Our author's hand is free, and he is quite able to do his lying for himself, without any aid from Geoffrey of Monmouth or any other liar. He will not merely invent laws, but he will invent legislators also; for who else has told us of the statutes of Thurmod and Leuthfred? The right to lie he exercises unblushingly. . . . Religion, morality, law, these are for him all one; they are for him law. . . . That he deliberately stated as law what he knew was not law, if by law we mean the settled doctrines of the King's court, will be sufficiently obvious to any one who knows anything of the plea rolls of the thirteenth century. . . . One word is wanted to make this true; the word 'not.' Our author knows that as well as we know it." All this is as true as it is vigorous, and it is evident that a book of which such things can be said is not one to be rashly used as authority.



It is not true, however, that the whole book is false. The greater part of it probably is sound, and some important statements of law for which there is no other direct authority are no doubt true. But it would require more labor to separate true from false than the result would be worth. With most of the old rolls and the Year Books for the whole reign of Richard II. yet to be published, students of legal history can devote their time to more profitable studies than that of the *Mirror*.

Professor Maitland gives much space to a consideration of the authorship of the treatise, and is inclined on the whole to acquit Andrew Horn, though not without grave doubt. His conjecture is that some young man, at a time when a great judicial scandal had just come to light, wrote this as a serio-comic attack on judges in general, and laughed in his sleeve at the result. "We guess that he wanted his readers to believe some things that he said. We can hardly suppose him hoping that they would believe all. We feel sure that in Paradise, or wherever else he may be, he was pleasantly surprised when Coke repeated his fictions as gospel truth, and erudite men spoke of him in the same breath with Glanvill and Bracton. That is just what he wished."

One more guess will do no harm; and though not so diverting as this, and more commonplace, it is at least possible. The great unevenness of the book is apparent; part is true, part is grossly false. Professor Maitland points out also the contradiction between different passages. Now the author writes as a cleric, now as a layman; now as a supporter of the King, now of the nobles; now as a Londoner, now as one opposed to the franchises of the city. May it not be that some young man of more zeal than knowledge got together from all possible sources such scraps of law as he could, and pieced them together? We may assume that such a youth had two or three notions, held with all the tenacity of ignorance, which appear as the two or three "leading motives" of the book. At this time, during the prosecution of the judges, all sorts of stories were of course flying about, such as nowadays would get into the newspapers; and the singular notions of law now often found among intelligent laymen must have been more common and more singular. These stories and notions would be grist for our young man's mill.

Whether we insist on our own guess or not, we must all agree that Professor Maitland's Introduction is a gem,—as perfect in its way as his Introduction to Bracton's Note Book, and its way is most diverting. One reader, at least, thinks the want of value in the *Mirror* itself much more than compensated by the clever comments to which it has given rise. We could better spare a much better book than the *Mirror* with this bright appurtenance.

J. H. B.

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THE CONSTITUTION OF THE UNITED STATES AT THE END OF THE FIRST CENTURY. By George S. Boutwell. Boston, U. S. A.: D. C. Heath & Co. 1895. pp. xviii, 412. Small 8vo. cloth, \$3.50.

"An examination of the authorities," says Governor Boutwell, "justifies and renders unavoidable the conclusion that the Constitution of the United States in its principles and in its main features is no longer the subject of controversy, of debate, or of doubt." "This is the only book," say his publishers in their accompanying circular, "in which the line between State sovereignty and the national supremacy of the government is marked distinctly." These two quotations show better the tone

of the work than more extended criticism could. The contents consist of three parts. The first third of the book contains annotated texts from the Declaration of Independence through to a thoroughly indexed text of the Constitution, with the references to decisions inserted immediately after each clause. Next follows a short essay on the "Origin and Progress of Independence," the general texts for which are perhaps found in the statements on page 148, that "for one hundred and thirty years" up to 1763 "the supremacy of Parliament had been denied whenever the claim was presented," and on page 149, that in this state of affairs "the only ground of hope was in negotiation, and that appears not to have been thought of" by England. Then a digest of decisions and comment completes the book. It is printed in the ordinary type of the text, instead of in the irritatingly fine print usually found in digests. It is also very conveniently arranged for reference under the Articles and clauses of the Constitution and other texts. This should make the book of service in hasty search for decisions upon special phrases of the Constitution.

R. W. H.

THE RELIGION OF THE REPUBLIC AND LAWS OF RELIGIOUS CORPORATIONS. By Alpha J. Kynett, D.D., LL.D. Cincinnati: Cranston & Curtis. New York: Hunt & Eaton. 1895. 8vo, pp. xxiii, 852.

The first part of the book is contributed directly by the author, and deals principally with the "American Civil Structure" and "Religion in the Republic." One might complain of the tendency in places to pulpit rhetoric in the treatment of these topics. At times, too, the discussion is marked by defects characteristic of most attempts to deal with large subjects in outline. One fails, for instance, from the summary of the colonial history of Virginia (page 32) to grasp the author's idea of the character of the Virginian colonists. This portion of the book is, however, an interesting contribution toward solving the somewhat perplexing relation of church and religion to our political forms of government. As a matter of law, exception may be taken to the inadequate definition of corporation (page 110) as "a creature of law having certain of the rights, powers, and duties of a natural person"; and according to the index, there is no allusion to the question of the enforceability of voluntary subscriptions for religious purposes. A collection of statutes — of every State — dealing with religious corporations forms the second part of the book, and has been prepared by the author's legal assistants. It is of value to all who have to do with church property. The work is carefully revised from the edition of 1886, and brought thoroughly up to date. Notes of judicial decisions interpreting the statutes are given wherever it is possible.

E. R. C.

THE AMERICAN DIGEST. ANNUAL. 1895. (Sept. 1, 1894, to Aug. 31, 1895). Prepared by the Editorial Staff of the National Reporter System. St. Paul, Minn.: West Publishing Co. 1895.

All the American cases of the past year are included in this volume, and they are some twenty thousand in number. The work is admirably indexed, and has the good quality of being a little less bulky than some of its predecessors, while accomplishing equally good results.

R. G. D.



THE RIGHT TO TAKE WATER FROM STREAMS AND LAKES FOR PUBLIC WATER SUPPLY. By R. G. Brown of the Minneapolis Bar. Press of F. W. Shepherd, New York. 1895. pp. 15.

This is a paper which was read before the last convention of the American Water Works Association. It is not an argument, but simply a statement of established principles, with the reasons which gave rise to them. The writer deduces a general rule, which is amply supported by his citations of all the leading cases on the subject in the United States. The essay is in fact a handy digest of the subject.

H. C. L.

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## JUSTICE ACCORDING TO LAW.<sup>1</sup>

THE only essential conditions for the existence of law and legal institutions are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity. Those conditions are present in all societies of men who are not mere savages. Even among civilized men, on the other hand, they may be suspended in particular circumstances.

We can get one example by supposing a boat's crew from a wrecked ship, made up of different nationalities in about equal proportions, to land on an island in the high seas which is neither occupied nor claimed by any civilized power. Such a party would, it is conceived, be remitted to what was once called "the state of nature," aided by whatever conventions they might agree upon as appropriate to their situation. A lawyer would probably advise them to consider themselves as still under the law of the ship's flag; but it is difficult to say that this or any other law would have any real authority apart from the agreement of the whole party.

Practically, the law of nature, or, in less ambiguous terms, the common rules of civilized morals and the dictates of obvious expediency, would have to suffice for the present need.

Again, it is not very difficult for civilized men to find themselves, without any violent accident, in places where it is hard to say

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<sup>1</sup> A public Lecture delivered in the University of Oxford, 1895.



whether any, and, if any, what law prevails in the ordinary sense. Take the case of an English or American traveller, or an Englishman and an American travelling together, in the region of the Khaibar Pass beyond the British frontier post at Fort Jamrud and before Afghan territory is reached. Certainly they are not subject to the law of British India, still less, if possible, to the law of Islam as applied in Afghanistan. Yet the persons and property of those who go up the Pass on the appointed days and with the proper escort are really safer than they would be in some parts of almost any European or American city. But peculiar phenomena of this kind, which are transitory accidents as compared with the ordinary course of civilized life, do not affect the normal operation and effects of civilized law, nor throw any light on its origin. If, on the other hand, a new social combination, which at first sight may have been precarious, becomes permanent, its members acquire, by convention or by submission to an existing jurisdiction, some permanent form of government and law. The inchoate stages of this process — which in fact has taken place in various parts of the world, such as the extreme Western States of America, within living memory — are interesting in their own way, but are hardly within the province of the lawyer. Settled rules and recognized jurisdiction are the lawyer's tests.

Law presupposes ideas, however rudimentary, of justice. But, law being once established, *just*, in matters of the law, denotes whatever is done in express fulfilment of the rules of law, or is approved and allowed by law. Not everything which is not forbidden is just. Many things are left alone by the State as it were under protest, and only because it is thought that interference would do more harm than good. In such things the notion of justice has no place: the mind of the State is rather expressed by Dante's "*guarda e passa*." The words "*just*" and "*justice*," and corresponding words in other tongues, have never quite lost ethical significance even in the most technical legal context. The reason of this — unduly neglected by some moderns for the sake of a merely verbal and illusive exactness — is that in the development of the law both by legislative and by judicial processes appeal is constantly made to ethical reason and the moral judgment of the community. Doubtless the servants of the law must obey the law, whether specific rules of law be morally just in their eyes or not; this, however, is only saying that the moral judgment we regard is the judgment of the community, and not the particular opinion of

this or that citizen. Further, some conflict between legal and moral justice can hardly be avoided, for morality and law cannot move at exactly the same rate. Still in a well ordered State such conflict is exceptional, and seldom acute. Legal justice aims at realizing moral justice within its range, and its strength largely consists in the general feeling that this is so. Were the legal formulation of right permanently estranged from the moral judgment of good citizens, the State would be divided against itself.

We may better realize the fundamental character of law by trying to conceive its negation or opposite. This will be found, it is submitted, in the absence of order rather than in the absence of compulsion. An exercise of merely capricious power, however great in relation to that which it acts upon, does not satisfy the general conception of law, whether it does or does not fit the words of any artificial definition. A despotic chief who paid no attention to anything but his own whim of the moment could hardly be said to administer justice, even if he professed to decide the disputes of his subjects. The best ideal picture I know in literature of what might be called natural injustice, the mere wantonness of power, is exhibited in the ways of Setebos as conceived by Robert Browning's "Caliban": "As it likes me each time I do: so He." In the same master's "Pippa Passes," the song of the ancient king, who judged sitting in the sun, gives a more pleasing, though not a more perfect, image of natural or rather patriarchal justice. Absence of defined rule, it must be remembered, is not the same thing as the negation of order. The patriarch may not do justice according to any consciously realized rule, and yet his decrees are felt to be just, and will go to the making of rules of justice for posterity.

It is true that even in highly civilized States we meet with occasional or singular acts of sovereign power which are outside the regular course of justice and administration, and which nevertheless must be counted as laws. In form they do not differ from the ordinary acts of the law-making authority, and in substance they are laws in so far as they affect in some way the standing of individual citizens before the law, must be regarded and acted upon by the judges and other public servants of the State, and will at need be put in force by the executive. In some of these cases there is really nothing abnormal except the form of the transaction. What began with being a special exercise of supreme power for a special occasion has settled into a routine which, though in form



legislative, is in substance administrative or judicial, or partly the one and partly the other. Such is the case in this country with the private Acts of Parliament by which railway and other companies are incorporated, and have powers of compulsory purchase and the like conferred on them. So before the establishment of the Divorce Court the dissolution of marriages by a private Act of Parliament was a costly and cumbrous proceeding, but still of a judicial kind. In these and similar cases the form of legislation has been rendered necessary by historical or constitutional accident. Sometimes, again, the purpose of these extraordinary legislative acts is to relieve innocent persons, and those who may have to derive titles to property from them, from the consequences of some venial failure to comply with the requirements of law. Marriages between British subjects have often been celebrated in good faith, but in fact without authority, by British consuls and other official persons in remote parts of the world, and on the error being discovered Acts of Parliament have been passed to give validity to the marriages so celebrated. Acts of indemnity have much the same nature, so far as they relate to the neglect or omission of requirements which have come to be regarded as merely formal. When the Test Acts were in force there was an annual Act of Indemnity for the relief of those public officers (being in fact the great majority) who had not performed and observed all the conditions which at one time had been supposed, and for a time possibly were, needful precautions for securing the Protestant succession to the throne. Lastly, that which in form is an act of legislation may be a more or less thinly disguised act of revolution, civil war, or reprisal against unsuccessful revolution. Acts of Attainder are the best English example in this kind: they must be carefully distinguished from impeachment, which is a regular process known to the law, though an unusual one. All these matters have their own historical and political interest; but we have nothing to learn from them about the normal contents and operation of legal institutions. The Roman name of *privilegia* marks them off as standing outside the province of regular and ordinary law.

Let us pass on, then, to consider what are the normal and necessary marks, in a civilized commonwealth, of justice administered according to law. They seem capable of being reduced to generality, equality, and certainty. First, as to generality, the rule of justice is a rule for citizens as such. It cannot be a rule merely for the individual; as the mediæval glossators put it, there cannot

be one law for Peter and another for John. Not that every rule must or can apply to all citizens; there are divers rules for divers conditions and classes of men. An unmarried man is not subject to the duties of a husband, nor a trader to those of a soldier. But every rule must at least have regard to a class of members of the State, and be binding upon or in respect of that class as determined by some definite position in the community. This will hold however small the class may be, and even if it consists for the time being of only one individual, as is the case with offices held by only one person at a time. Certain rules of law will be found in almost every country to apply only to the prince or titular ruler of the State, or to qualify the application of the general law to him. In England, again, the Prince of Wales, as Duke of Cornwall, is the subject of rules forming a singular exception to the general law of property; and the Lord Chancellor has many duties and powers peculiar to his office. But these rules are not lacking in the quality of generality, for in every case they apply not to the individual person as such, but to the holder of the office for the time being. They may be anomalous with regard to the legal system in which they occur; and, like other rules of law, they may or may not be expedient on the particular merits of each case. They are not in any necessary conflict with the principles of legal justice merely because they are of limited or unique application.

Next, the rule of generality cannot be fulfilled unless it is aided by the principle of equality. Rules of law being once declared, the rule must have the like application to all persons and facts coming within it. Respect of persons is incompatible with justice. Law which is the same for Peter and for John must be administered to John and to Peter evenly. The judge is not free to show favor to Peter and disfavor to John. As the maxim has it, equality is equity, though the working use of the maxim is not quite so simple as this. So much is obvious, and needs no further exposition. But it may be proper to point out that the rule of equality does not exclude judicial discretion. Oftentimes laws are purposely framed so as to give a considerable range of choice to judicial or executive officers as to the times, places, and manner of their application. It is quite commonly left to the judge to assign, up to a prescribed limit, the punishment of proved offences; indeed, the cases in which the court is deprived of discretion are exceptional in all modern systems. Apart from capital offences, there are only one or two cases in English criminal law where a minimum punishment is im-



posed, and none, it is believed, where there is no discretion at all. Certain remedies and forms of relief, in matters of civil jurisdiction, are said to be discretionary as contrasted with those which parties can demand as their right. Still, a judicial discretion, however wide, is to be exercised without favor, and according to the best judgment which the person intrusted with the discretion can form on the merits of each case. In various cases where the risk of discretion being perverted by outside influence or pressure has seemed greater than that of spontaneous partiality, the holders of discretionary power or authority are deliberately exempted from being called on to give an account of their reasons. In such cases the discretion is said to be not judicial but absolute. Examples are the protector of a settlement, and the governing bodies of schools under the Public Schools Act. Differences of personal character and local circumstances are often quite proper elements in the formation of such a judgment, but any introduction of mere personal favor is an abuse. We still aim at assigning equal results to equal conditions. Judicial discretion is not an exception to the principle of equality, but comes in aid of it where an inflexible rule, omitting to take account of conditions that cannot be defined beforehand, would really work inequality. This implies that only such conditions are counted as are material for the purposes of the rule to be applied. Of course no two persons or events can be fully alike. What rules of law have to do is to select those conditions which are to have consequences of certain kinds; which being done, it is the business of the courts to attend to all those conditions, and, saving judicial discretion where it exists, not to any others. A plaintiff who argues his case in person may be tedious and offensive, but the judge must nevertheless do him justice as fully as if his argument were excellent. This may seem too obvious for statement in England, but there are parts of the British Empire where it is not, or within recent times was not so. Suppose, on the other hand, it were a rule of law that no man who wore a white hat before May-day could take a legacy within the year. It would not be competent to any court to say that, as between A. and B., rival claimants for the same legacy, the legacy should be paid to A., notwithstanding that he had worn a white hat in April, because he was a poor man and more in want of money than B. The law cannot make all men equal, but they are equal before the law in the sense that their rights are equally the subject of protection and their duties of enforcement.

Further, as the requirement of generality leads to that of equality, so does the requirement of equality lead to that of certainty, which brings in its train the whole scientific development of law. We must administer a general rule, and administer it equally. There can be no law without generality; there can be no just operation of law without equality. But we cannot be sure of a rule being equally administered at different times and in the cases of different persons unless the rule is defined and recorded. Justice ought to be the same for all citizens, so far as the material conditions are the same. Now to carry out this idea the dispenser of justice ought to be adequately furnished with two kinds of information. He should know what is accustomed to be done in like cases, and whenever new conditions occur he should know, or have the means of forming a judgment, which of them are material with a view to legal justice and which are not. Moreover, there must be some means of securing an approximate uniformity of judgment; otherwise judges and magistrates of all degrees will make every one a law of his own for himself, and the principle of equality will not be satisfied. Justice dealt out according to the first impression of each particular case, the "natural justice" of an Eastern king sitting in the gate, is tolerable only when the community is small enough for this function to be in the hands of one man, or very few, and its affairs are simple enough for off-hand judgments not to produce results of manifest inequality. This is as much as to say that in a civilized commonwealth law must inevitably become a science. The demand for certainty becomes more exacting as men's affairs become more complex, and the aid of the courts is more frequently sought. Trade and traffic, in their increasing volume, speed, and variety of movement, raise new questions at every turn, and men expect not only to get their differences settled for the moment, but to have solutions which will prevent the same difficulties from giving trouble again. How far would natural justice carry us, for example, towards a settlement of the problems involved in making contracts by letter, telegraph, or telephone?

Hence law becomes an artificial system, which is always gathering new material. The controverted points of one generation become the settled rules of the next, and fresh work is built up on them in turn. Thus the law is in a constant process of approximation to an ideal certainty, which by the nature of the case can never be perfectly attained at any given moment. Every one who has studied the law knows that the approximation is apt to be a



rough one, and is exposed to many disturbing causes. I hope to say something at a future time of the methods by which it is effected in the system of the Common Law. Meanwhile it is to be remembered that the political sciences do not claim to be exact in either a speculative or a practical point of view. For the practical purposes of a State governed according to law, that degree of certainty suffices which will satisfy the citizens that the law works on the whole justly and without favor; and in archaic societies not only is a pretty rough kind of certainty sufficient, but no other is possible.

Rules of law have to be applied to the facts ascertained by the tribunal. Now the facts are often in dispute; indeed, those cases are a small minority where there is a real difference between the parties, and that difference turns merely upon the application of the law to undisputed facts. Much of the work done by the machinery of justice consists in enforcing just claims to which there is no defence, but mere refusal or neglect to pay one's debts without compulsion of law does not constitute a real matter in difference. And the process of forming a judgment as to the truth of the facts, where conflicting accounts are offered, is itself an approximate one at best for human faculties. In early stages of legal institutions we find that there is hardly so much as a serious attempt in this direction; the matters at issue are disposed of by methods which seem to us at this day not only artificial and inadequate, but out of all relation to any grounds of reasonable conclusion. The task would indeed seem to have been thought above the power of mortals. Ordeal in its various forms is a direct appeal to supernatural aid in the supposed incompetence of human understanding. Proof by oath, where the oath is conclusive, — a procedure of which the mediæval "compurgation" is the best known example, — is the same thing in a milder form. Wherever and so long as the facts cannot be ascertained with any precision, there is no occasion for precise or elaborate rules of law. The law cannot be more finely graduated than the means of ascertaining facts; and the judicial investigation of facts with something approaching completeness and exactness dates only from relatively modern times. Hence the development of law is largely bound up with the development of procedure. As improved procedure enables the law to grapple with complex facts, the aspirations of lawyers and citizens are enlarged, and they are by no means content to aim at the minimum of certainty which will insure public acquiescence in the justice of

the State, and a tolerable average of obedience. On the contrary, they will aim — as men do in every science and art, when once they become seriously interested in it — at an ideal maximum. But even in the most advanced polity we shall find now and then that the subtilty of forensic and judicial thought outruns the possibilities of effectual inquiry and administration. Questions are sometimes put to juries which it is hardly possible for any one not learned in the law to see the point of.

In assuming a scientific character, law becomes, and must needs become, a distinct science. The division of science or philosophy which comes nearest to it in respect of the subject-matter dealt with is Ethics. But, though much ground is common to both, the subject-matter of Law and of Ethics is not the same. The field of legal rules of conduct does not coincide with that of moral rules, and is not included in it; and the purposes for which they exist are distinct. Law does not aim at perfecting the individual character of men, but at regulating the relations of citizens to the commonwealth and to one another; — and inasmuch as human beings can communicate with one another only by words and acts, the office of law does not extend to that which lies in the thought and conscience of the individual. The possible coincidence of law with morality is limited, at all events, by the range of that which theologians have named external morality. The commandment, "Thou shalt not steal," may be, and in all civilized countries is, legal as well as moral; the commandment, "Thou shalt not covet," may be of even greater importance as a moral precept, but it cannot be a legal one. Not that a legislator might not profess to make a law against covetousness, but it would be inoperative unless an external test of covetousness were assigned by a more or less arbitrary definition; and then the real subject-matter of the law would be, not the passion of covetousness, but the behavior defined as evincing it. The saying ascribed (it seems apocryphally) to Dr. Keate of Eton, "Boys, if you're not pure in heart I'll flog you," exemplifies in a neat form the confusion of external and internal morality. The judgment of law has to proceed upon what can be made manifest, and it commonly has to estimate human conduct by its conformity or otherwise to what has been called an external standard. Action, and intent shown in acts and words, not the secret springs of conduct in desires and motives, are the normal materials in which courts of justice are versed, and in the terms of



which their conclusions are worked out and delivered.<sup>1</sup> An act not otherwise unlawful in itself will not generally become an offence or legal wrong because it is done from a sinister motive, nor will it be any excuse for an act contrary to the general law, or in violation of any one's rights, to show that the motive from which it proceeded was good. If the attempt is made to deal with rules of the purely moral kind by judicial machinery, one of two things will happen. Either the tribunal will be guided by mere isolated impressions of each case, and therefore will not administer justice at all; or, which is more likely, precedent and usage will beget settled rule, and the tribunal will find itself administering a formal system of law, which in time will be as technical, and appeal as openly to an external standard, as any other system. This process took place on a great scale in the formation of the Canon Law, and on a considerable scale in the early history of English equity jurisdiction.

Besides and beyond the limitation of the field of law to external conduct, there are many actions and kinds of conduct condemned by morality which for various reasons law can either not deal with at all or can deal with only in an incidental and indirect manner. It would be the vulgarest of errors (as we have already hinted) to suppose that any kind of approval is implied in many things being left to the moral judgment of the community, and to such pressure as it can exercise. Law does not stand aside because lawyers or judges think lightly of such things, but because, whether from permanent or from transitory causes, the methods of legal justice are not appropriate for dealing with them, and the attempt to apply those methods would, so far as it could be operative at all, probably do more harm than good. At the same time rules of law may well have, in particular circumstances, an effective influence in maintaining, reinforcing, and even elevating the standard of current morality. The moral ideal present to lawgivers, lawyers, and judges, if it does not always come up to the highest that has been conceived, will at least be, generally speaking, above the common average of practice; it will represent the standard of the best sort of citizens. This is especially the case in matters of

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<sup>1</sup> The exceptions are perhaps of an accidental and not very substantial kind, but, after all corrections and allowances, "malice" does sometimes in English law mean evil motive, such as personal enmity or vindictiveness. The general rule has been conspicuously affirmed by the House of Lords in *Corporation of Bradford v. Pickles*, 1895, A. C. 587; it remains to be seen whether the House will approve on the final appeal, now pending, the extent to which the exception is carried by the Court of Appeal in *Flood v. Jackson*, 1895, 2 Q. B. 21.

good faith, whether we look to commercial honesty or to relations of personal confidence. With few exceptions, the law has in such matters been constantly ahead not only of the practice, but of the ordinary professions of business men. We have similar results on a more striking scale when a law which is not indigenous brings in with it the moral standards on which it is founded. Thus a good deal of European morality has been made current in India by the Anglo-Indian codes; and European morality itself has been largely moulded not only by the teaching of the Christian Church, but by the formal embodiment of that teaching in both ecclesiastical and secular laws. The treatment of homicide by early English criminal law was founded on the extremely strict view taken by the Church of the guilt of blood-shedding; and the extinction of duelling in this country seems to be due, in no small part, to the steady refusal of English law to regard killing in a duel, even without any circumstances of treachery or unfairness, as anything else than murder. We are not speaking here of the mere fact that persons abstain from unlawful conduct through dread of the legal consequences, a fact which, taken by itself, has no moral significance at all.

Again, rules of law differ from rules of morality in excess as well as in defect. It is needful for the peace and order of society to have definite rules for a great many common occasions of life, although no guidance can be found in ethical reasoning for adopting one rule rather than another. There is no law of nature that prescribes driving on either the right or the left side of the road, as is plainly shown by the fact that our English custom to take the left side is the reverse of that which is observed in most other countries. But in a land of frequented roads there must be some fixed rule in order that people who meet on the road may know what to expect of one another. And, the rule being once fixed either way for the sake of general convenience, we are bound in moral as well as in legal duty to observe the rule as we find it. On much the same footing are the rules which require particular forms to be observed in particular transactions, for the purpose of making the proof of them authentic and easily found, or in the interest of the public revenue, or for other reasons. There are not many such cases in which the form actually imposed by the law can be said to be in itself the only appropriate one, or obviously much better than others that might be thought of. But, since it has been thought fit to require some form, it is necessary



that some one form should be authorized. Here too the choice between courses which in themselves were morally indifferent is determined by the law, and thenceforth it is the moral as well as the legal duty of every one concerned, if he will act as a good citizen and a prudent man, to do things in the appointed manner and form.

But there is more than this. As in many cases acts and conduct that are morally blameworthy must go quit of anything the law can do, so in many cases, on the other hand, persons are exposed, for reasons of public expediency, to legal responsibilities which may or may not be associated with moral fault, and which cannot be avoided even by the fullest proof that in the particular case the person who is answerable before the law was morally blameless. A man may, of course, make himself answerable by his own promise for many things independent of his moral deserts, or even wholly beyond his control: but we are here speaking of liability not accepted by the party's own act and consent, but imposed by a rule of law which does not depend on any one's consent for its operation. Thus a man is liable in most civilized countries for the wrongful acts and defaults of his servants in the course of their employment, whatever pains he may have taken in choosing competent servants and giving them proper instructions. Obviously this is a hard rule for the employer in many cases; but its existence in every system of law shows that in the main it is felt to be just. Again, both Roman and English law have made owners of buildings<sup>1</sup> responsible, in various degrees, for their safe condition as regards passers by in the highway, or persons entering them in the course of lawful business: and this without regard to the amount of the owner's personal diligence in the matter. Again, questions often arise between two innocent persons, of whom one or other must bear the loss occasioned by the wrongful act of some one from whom redress cannot be obtained; as when a man who has obtained goods by fraud from their owner sells them to an unsuspecting third person, and then absconds, leaving nothing behind him. Here the original owner and the buyer may be equally free from fault, but they cannot both have the goods, and their price cannot be recovered. Hardship to one or the other is inevitable.

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<sup>1</sup> This is by no means the full measure of the rule in our law. For simplicity's sake, only part of it is now stated.

In all these cases the loss or damage, as between the two innocent parties who are left face to face, may be considered as accidental. The rule of law has to determine as best it can on which side the loss should fall; and since by the hypothesis neither party has incurred moral blame, and this is the very cause of the difficulty, it is plain that the rules of ordinary social morality will afford no guidance. We have to resort either to considerations of general public expediency, or, if no obvious balance of convenience appears either way, to the purely technical application of rules already settled in less obscure matters. And this last method is not a mere evasion of the problem, but is a reasonable solution so far as no stronger reason can be assigned to the contrary. For the principle of certainty requires that a rule once settled shall be carried out to its consequences when no distinct cause is shown for making an exception or revising the rule itself. If any sense of hardship to the individual citizen remains after these considerations have been weighed, and it has also been observed that citizens have an equal chance of benefit as well as burden under special rules of this kind, it may be said that exposure to this kind of liability is part, and not a large part, of the price which the individual has to pay the State for the general protection afforded by its power, and the general benefit of its institutions.

Thus neither the work nor the field of legal science can be said to coincide with those of any other science; and the development of this, as of all other distinct branches of science, can be carried on only by the continuous effort of persons who make it the chief object of their attention in successive generations. This has been recognized in the institutions, both practical and academical, of all civilized nations. A civilized system of law cannot be maintained without a learned profession of the law. The formation and continuance of such a learned class can be and has been provided for, at different times and in different lands, in various ways, which it does not now concern us to mention in detail. It is not necessary for this purpose that the actual administration of justice should be wholly, or with insignificant exceptions, in the hands of persons learned in the law, though such is the prevailing tendency of modern judicial systems. It is enough that the learned profession exists, and that knowledge of the law has to be sought, directly or indirectly, in the deliberate and matured opinion of its most capable members. And the activity of modern legislation makes little or no difference to this; for we are not now speaking of the gen-



eral policy of the lawgiver, which in a free country is and must be determined not by any one class, but by the people through their representatives. The office of the lawyer is first to inform the legislature how the law stands, and then, if change is desired, (as to which he is entitled to his opinion and voice like any other citizen,) to advise how the change may best be effected. Every modern legislature is constantly and largely dependent on expert aid of this kind. A well framed Act of Parliament, whatever amount of novelty it may contain, is as much an application of legal science as the considered judgment of a court. Legislation undertaken without legal knowledge is notoriously ineffectual, or, if not ineffectual, apt to create new troubles greater than any which it cures. There is no way by which modern law can escape from the scientific and artificial character imposed on it by the demand of modern societies for full, equal, and exact justice.

*Frederick Pollock.*

## A NEW NATION.

"EVERYTHING gravitates to Washington: the highest interests and the most absorbing ambitions look to the National capital for gratification; and it is no longer the State, but the Nation, that in men's minds and imaginations is an ever present sovereignty. . . . We may preserve the Constitution in its every phrase and every letter with only such modification as was found essential for the uprooting of slavery; but the Union as it was has given way to a new Union, with some new and grand features, but also with some engrafted evils which only time and the patient and persevering labors of statesmen and patriots will suffice to eradicate."<sup>1</sup>

"There has grown up a pride in the National Flag and in the National Government as representing National Unity. . . . As the modes in and by which these and other similar causes can work are evidently not exhausted, it is clear that the development of the Constitution as between the Nation and the States, has not yet stopped, and present appearances suggest that the centralizing tendency will continue to prevail."<sup>2</sup>

The above cited statements were written and published nearly ten years ago, but the centralizing tendencies therein noted have not ceased, and it would be easy to-day to glean from recent publications, including the daily newspaper, citations of a similar purport sufficient of themselves to make a magazine article.

The purpose, however, of the present inquiry is not so much to note the changes in public sentiment which have been going on, as it is to consider from a legal standpoint what changes have of recent years, as a matter of fact, taken place in the framework of the National Government.

It is a matter of history, and is well understood, that after the close of the late Civil War there was a reconstruction (more or less under National supervision) of the State Governments in those States which had sought to terminate the Union.

This fact is so widely known, and was so prominent a feature

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<sup>1</sup> Cooley, *History of Michigan*, p. 371 (1885).

<sup>2</sup> Bryce, *The American Commonwealth*, Vol. I. p. 394.



of the history of those times, that the period is frequently spoken of as the Reconstruction Period.

But it is not, I venture to say, even now, after a lapse of over twenty-five years, fully realized that there was during the same period a Reconstruction also of the National Government.

By Reconstruction I mean a radical departure from the original theory which the founders of the government had clearly in mind when in 1787 they framed the Constitution and in 1789 added the first ten Amendments thereto.

When in 1865, 1866, and 1869 the Thirteenth, Fourteenth, and Fifteenth Amendments were proposed by Congress, and submitted to the people, it was commonly understood that their purpose was to finally do away with slavery, and secure to the negro his personal and political rights. Speaking of these three Amendments, Mr. Bryce says (Vol. I. p. 357): "These three amendments are the outcome of the War of Secession, and were needed in order to confirm and secure for the future its results."

In the so called Slaughter-House Cases in the Supreme Court of the United States, reported in 16 Wall. 36 (1873), Mr. Justice Miller, in delivering the opinion of the court (p. 71), says:—

"We repeat, then, in the light of this recapitulation of events almost too recent to be called history, but which are familiar to us all,—and on the most casual examination of the language of these amendments no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested,—we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."

Again (at page 81):—

"We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class or on account of their race will ever be held to come within the purview of this provision. [The provision referred to is, 'Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.'] It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other."

But even as early as 1873, there were those who saw in these Amendments a broader meaning and a wider application. Four

members of the Supreme Court — viz. Chief Justice Chase, Mr. Justice Field, Mr. Justice Swayne, and Mr. Justice Bradley — dissented from the decision of the majority of the court, and three of them wrote dissenting opinions taking a very different view of the scope and effect of the said Amendments. The majority of the court consisted of Justices Clifford, Miller, Davis, Strong, and Hunt. Mr. Justice Field in his dissenting opinion, which was concurred in by the other dissenting judges, says (pp. 89, 93, 95): —

“The question presented is therefore one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent Amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the Fourteenth Amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it. . . . The Amendment [XIV.] was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National Government. It first declares that ‘all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.’ It then declares that ‘no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.’ . . . A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any State. . . . The Amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities which belong of right to citizens as such, and ordains that they shall not be abridged by State legislation.”

Mr. Justice Bradley in his dissenting opinion in the same case (p. 121) says: —

“Can the Federal Courts administer relief to citizens of the United States whose privileges and immunities have been abridged by a State? Of this I entertain no doubt. Prior to the Fourteenth Amendment this could not be done, except in a few instances, for the want of the requi-



site authority. . . . Admitting, therefore, that formerly the States were not prohibited from infringing any of the fundamental privileges and immunities of citizens of the United States except in a few specified cases, that cannot be said now since the adoption of the Fourteenth Amendment. In my judgment it was the intention of the people in adopting that Amendment to provide National security against violation by the States of the fundamental rights of the citizen."

We shall show later that since 1873, while the decisions of the court have tended on the whole to give a narrow meaning to the words "privileges and immunities" as used in the Fourteenth Amendment, the intimation of Mr. Justice Miller that the Amendment ought to be construed as applying only to the colored race has not been heeded, and all these Amendments are now held to apply to all citizens without regard to their race or color.

What then was the change worked by these Amendments in the theory of our National Government?

Before we can answer this, it is necessary to state as briefly as we may what was the theory of the Constitution of 1787-89 as regards the personal rights, privileges, and immunities of the individual citizens, and the manner in which they should have security and protection in the enjoyment of the same.

Prior to the Declaration of Independence, July 4, 1776, owing to the distance of the several Colonies from the mother country and the existing character of the English government, the Colonists for the most part looked solely to their several Colonial governments for the protection of their individual rights. The government of George the Third they deemed an oppressive one. Their experience with him and his Parliaments rendered the Colonists distrustful of all external government, and made them prefer the local government, which was largely of their own making, and more familiar and more within their own control.

"Each [Colony] had its legislature, its own statutes adding to or modifying the English common law, its local corporate life and traditions, with no small local pride in its own history and institutions, superadded to the pride of forming part of the English race and the great free British realm. Between the various Colonies there was no other political connection than that which arose from their all belonging to this race and realm, so that the inhabitants of each enjoyed in every one of the others the rights and privileges of British subjects."<sup>1</sup>

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<sup>1</sup> Bryce, *The American Commonwealth*, Vol. I. p. 16.

As Englishmen they were entitled to such rights as were guaranteed by the Magna Charta, the Petition of Right, the Habeas Corpus Act, and the Bill of Rights. The Charters of many of the Colonies contained provisions intended to secure the rights of the individual; e. g. the Charter of the Colony of Massachusetts Bay granted by Charles I. in 1628, and also the Charter of the Province of the Massachusetts Bay (which included Massachusetts, New Hampshire, and Maine) granted by William and Mary in 1691, each provided: —

"All . . . of the subjects of us . . . which shall go to and inhabit within our said Province, . . . and every of their children which shall happen to be born there, . . . shall have and enjoy all *liberties* and *immunities* of free and natural subjects within any of the dominions of us . . . to all intents . . . as if they . . . were born within this our realm of England."<sup>1</sup>

It was the infringement of their rights, liberties, and immunities by the British Parliament which they made the ground for declaring their independence.

At the first gathering of the Continental Congress, consisting of deputies from the several Colonies in 1774, on October 10th, a Declaration of Rights was adopted in which it was set out: —

"That the inhabitants of the English Colonies in North America by the immutable laws of nature, the principles of the English Constitution, and the several Charters or Compacts have the following rights:

"1. That they are entitled to *life, liberty, and property*. . . .

"2. That our ancestors were at the time of their emigration from the mother country entitled to all the *rights, liberties, and immunities* of free and natural born subjects within the realm of England.

"3. That by such emigration they neither forfeited, surrendered, nor lost any of those rights."

An enumeration of some of these rights and immunities is then set forth, and a statement made of various Acts of Parliament which violate these rights and ought to be repealed.

At the same session, on October 20th, 1774, the Continental Congress, "to obtain redress of these grievances which threaten destruction to the *lives, liberty, and property* of his Majesty's subjects in North America," prepared, and its members signed on behalf of themselves and their constituents, what is known as the Non-Importation Agreement, binding all the Colonies (not includ-

<sup>1</sup> Ancient Charters, pp. 13, 31.



ing Georgia which was not represented) to act together in certain specified ways.

Immediately following the Declaration of Independence, in 1776, came the work in each of the Colonies of setting up independent State governments with written Constitutions more or less elaborate. This was in each instance the work of each new State acting by itself. There was some copying by one from another of provisions in the several Constitutions, but there was apparently no interference of one State with another in this work, and apparently no attempt to secure harmonious results.

It was indeed a reconstruction period, but there was no Federal or National Government to aid or hinder the independent action of each of the new Thirteen States. Each State made secure in its own way the life, liberty, and property, and the privileges and immunities, of its own citizens.

In Rhode Island and Connecticut the Colonial Charters were made to serve as State Constitutions.

It is interesting to note that in none of the new States except Connecticut was there any constitutional provision made defining or securing the rights of non-residents, that is, of citizens of the other States when within the State. In a few of the new States — e. g. Pennsylvania and North Carolina — it was provided that *foreigners* might, after taking an oath of allegiance, acquire real estate, and after a year's residence be deemed free citizens.

In Connecticut, in an act passed in 1776 establishing the frame of the new government, it was declared: —

“That all the free inhabitants of this or any other of the United States of America and foreigners in amity with this State shall enjoy the same justice and law within this State which is general for the State in all cases proper for the cognizance of the civil authority and Court of Judicature within the same, and that without partiality or delay.”<sup>1</sup>

One reason for such omission may possibly be the fact that the Articles of Confederation, which were framed July 9, 1778, though not finally ratified till 1781, were in process of making, and were known to the people after 1776 as their expected Constitution.<sup>2</sup> In Article IV. of the Articles of Confederation it was provided: —

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<sup>1</sup> Thayer's Cases on Constitutional Law, Vol. I. p. 433.

<sup>2</sup> Fiske, The Critical Period of American History, p. 97.

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union the free inhabitants of each of these States . . . shall be entitled to all *privileges* and *immunities* of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the *privileges* of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."<sup>1</sup>

There is one further fact which should be noted in regard to the several State Constitutions, — all of which were framed and in force prior to 1781, — namely, that in many of them, notably those of Pennsylvania, Delaware, Maryland, and North Carolina, there was a provision declaring that the people of the State ought to have the sole right of regulating the internal government and police thereof.

From 1781 until 1787, when our present Constitution was framed, the evils which existed were many and serious; so much so that the country was drifting toward, if not on the verge of anarchy.<sup>2</sup>

Among these evils was the inability of the Congress to raise money to pay its debts or meet its expenses. Another was its powerlessness to provide the country with sound money, and still another its inability to secure from the States the performance of the several Treaties which had been made with England and European powers. The currency of the country was entirely disorganized. Still other evils were caused by the jealousies existing among the several States, leading to commercial quarrels and almost to actual warfare between different States. But the effect of all this was to increase rather than diminish the feeling of State independence. The character of the Federal Government, moreover, thus far had not been such as to invite any one to rely upon it for protection of any class of rights whatsoever.

Congress having under the Articles of Confederation no power to act directly upon the people, but only upon the States, had practically no power at all, and after the close of the war became more and more incapable of performing any valuable service to the country.

Such then, in brief, was the condition of things when the fifty-

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<sup>1</sup> Bryce, *The American Commonwealth*, Vol. I. p. 662.

<sup>2</sup> See Fiske, *Critical Period of American History*, Chapter IV.



five delegates assembled, in the summer of 1787, to revise the Articles of Confederation. But it was already apparent to the leading delegates that something besides patching was necessary, and the Convention speedily set about the work of preparing a new framework for a new National Government.

Even a cursory study of the debates in the Convention shows with what reluctance the power of acting in any way directly upon the individual citizens was granted to the Federal Government.

There was an ever present fear that the Federal Government—even its friends hesitated to call it National—would swallow up, or at least overshadow the States, and extinguish local independence. The feeling of many—I may say of very many—of the delegates was the same as that of one of our present historians:—

“If the day should ever arrive (which God forbid!) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self-government of the States shall have been so far lost as that of the Departments of France, or even so far as that of the Counties of England,—on that day the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever.”<sup>1</sup>

The work of the Convention was in a considerable degree a matter of compromise, or rather of a series of compromises.

The power to regulate foreign and interstate commerce was secured for the National Government only by conceding to the Slave States a continuance of the slave trade for twenty years.<sup>2</sup>

Hamilton's suggestion that the National Government be given powers practically unlimited was received with extreme disapproval. The New Jersey plan, providing for a Confederacy, left the States with no essential curtailment of their sovereign power. The Virginia Plan, while providing for a Union under a National Government, sought to clothe such government with power only in matters relating to the national peace and harmony.<sup>3</sup>

The Scheme of Government which was finally framed and adopted was briefly as follows:—

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<sup>1</sup> John Fiske, *The Critical Period of American History*, p. 238.

<sup>2</sup> Curtis, *Constitutional History of the United States* (1889), Vol. I. p. 305.

<sup>3</sup> See Report of the Committee of the Whole, reported to the Convention, June 13, 1787, given in Curtis, *Constitutional Hist. of U. S.*, Vol. I. pp. 365, 366.

I. The National Government alone was charged with the duty and with the power of regulating what may be called matters of national concern. The chief of these were treaties and the foreign relations of the country, the army and navy, foreign and interstate commerce, the currency, and the post office. To insure the performance of these duties, power to raise money was granted, and three departments of the National Government were provided for, viz. the Legislative, the Executive, and the Judicial.

II. The States were left with all the other ordinary powers of internal government, such as legislation on private law, civil and criminal, the maintenance of law and order, the creation of local institutions, education, and the relief of the poor.

III. In a few matters a concurrent power was given to the National Government and the States; e. g. in controversies between citizens of different States, the parties, if so minded, could have their rights determined in the State Courts, or, at the option of any party who might fear unfair discrimination, cases could be taken into the Courts of the United States.

IV. Certain prohibitions were provided applicable to both the National and the State Governments; e. g. that no tax should be laid on exports from any State.

V. Certain prohibitions were imposed on the National Government alone. These were contained in Article I. § 9, and in the first ten Amendments. Among these were provisions intended to secure the life, liberty, and property of individuals from being unjustly assailed by the National Government.

VI. Certain prohibitions were imposed on the States alone. These were contained in Article I. § 10. They were of two kinds: *First*, provisions intended to keep the States from attempting to exercise any of the powers intrusted solely to the National Government. *Second*, the following provisions intended to protect individuals against oppressive State legislation, viz.: "No State shall . . . pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

VII. Provision was made for securing the rights of non-residents, that is, of citizens of one State when in another State.

The language used on this point was largely taken from Article IV. of the Articles of Confederation.<sup>1</sup>

The first paragraph of § 2 is as follows: "The citizen of each

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<sup>1</sup> See Article IV. of Constitution, §§ 1 and 2.



State shall be entitled to all *privileges* and *immunities* of citizens in the several States."

The important thing to be noticed in all the foregoing summary is that—except in the three specified cases of bills of attainder, *ex post facto* criminal laws, and laws impairing the obligation of contracts—no attempt was made to protect the individual citizens from oppressive treatment by their own States. The States could oppress their own citizens without limit in all matters of domestic concern. They could abolish trial by jury in criminal or civil cases. They could suppress freedom of speaking and establish a censorship of the press. It was not a part of the scheme of government embodied in the Constitution that the National Government should be authorized to interfere between any State and its own citizens.

"To have authorized such intervention would have been to run counter to the whole spirit of the Constitution, which kept steadily in view, as the wisest policy, local government for local affairs, general government for general affairs only."<sup>1</sup>

As there was no language in the Constitution which could afford any ground for supposing that the United States Supreme Court had any power of protecting a citizen in his rights, privileges, and immunities as against his own State and its tribunals, it is not surprising that few cases are to be found in which protection for such rights has been sought in this quarter.<sup>2</sup> This cannot be attributed to any unwillingness of the citizens to look to the National Power for such help as it could afford. The one clause in the Constitution extending the Federal protection to individual civil rights,—I refer to Article I. § 10, paragraph 1, "No State shall . . . pass any . . . law impairing the obligation of contracts,"—has given the United States Supreme Court more work to do and more cases to deal with than any other clause in the entire Constitution.<sup>3</sup>

Having shown as far as we may in the space allowed what the frame of the National Government was prior to the adoption of

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<sup>1</sup> Judge Cooley, cited in Bryce, *The American Commonwealth*, Vol. I. p. 331. See *HARVARD LAW REVIEW*, Vol. I. pp. 322-326, Article by Wm. H. Dunbar, entitled "The Anarchists' Case."

<sup>2</sup> See *Scott v. Sanford*, 19 Howard, 395, 452 (1856).

<sup>3</sup> See Baker, *Annotated Constitution of the United States* (1891), pp. 68-101, for a partial list of such cases.

the Thirteenth, Fourteenth, and Fifteenth Amendments, we come now in conclusion to a consideration of the magnitude and extent of the changes effected by those Amendments. "The revolution worked by these Amendments is a momentous one, and must be judged by consequences which time alone can disclose."<sup>1</sup>

It is to be noticed in the first place that the language of the Fourteenth Amendment is sufficiently broad and comprehensive to embrace all the rights of the individual citizens, and place them under the shelter and protection of the National power. The words "privileges and immunities," and "life, liberty, and property," had been long in use when the Fourteenth Amendment was framed. The words "liberties and immunities," as we have seen, were used in the Charter of the Province of Massachusetts Bay. The same words, and the words "life, liberty, and property," were used in the Declaration of Rights adopted by the Continental Congress, October 10, 1774.<sup>2</sup> The words "life, liberty, or property" were used in the Fifth Amendment, framed in 1789, and the words "privileges and immunities" were used in the Constitution itself, Article IV. § 2. The words "privileges and immunities" were defined by Mr. Justice Washington, sitting in the Circuit Court of the United States for Pennsylvania in 1825, in the case of *Corfield v. Coryell*, 4 Wash. C. C. 371. He says:—

"The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature fundamental, which belong of right to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several States which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may however be all comprehended under the following general heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and main-

<sup>1</sup> Hare's American Constitutional Law, Vol. II. p. 748 (1889).

<sup>2</sup> All these words were used in many of the State Constitutions. See Cooley's Constitutional Limitations, 6th ed. (1890), pp. 429, 430.



tain actions of any kind in the Courts of the State; to take, hold, and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State,—may be mentioned as some of the particular *privileges* and *immunities* of citizens which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise as regulated and established by the laws or Constitution of the State in which it is to be exercised. These and many others which might be mentioned are strictly speaking *privileges* and *immunities*, and the enjoyment of them by the citizens of each State in every other State was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation) the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union."

The words "privileges and immunities," and "life, liberty, and property," come down to us from the time of Magna Charta. For a discussion of the meaning of the word "liberty," see an article entitled "Meaning of the Term 'Liberty' in Federal and State Constitutions," by Charles E. Shattuck, 4 HARVARD LAW REVIEW, 365.

It is sufficient for the present purpose to say that the words used in the Fourteenth Amendment, whether considered historically or simply with reference to their popular signification, are broad enough to allow the United States Supreme Court (when so disposed) to give protection to all the fundamental rights of the citizens of the several States.

It will not be possible to consider all the cases which have arisen under these Amendments. A large number of them are to be found in Thayer's Cases on Constitutional Law, Part II.

It is noticeable that the Supreme Court of the United States at an early day recognized the fact, that unless the broad language of these Amendments, and especially that of the Fourteenth Amendment, could in some way be shorn of its full significance, the fundamental groundwork of the National Government must be considered at once as essentially altered.<sup>1</sup>

This appears in the language of the court (Mr. Justice Miller delivering the opinion) in the Slaughter-House Cases, 16 Wall. 36, above cited:—

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<sup>1</sup> See HARVARD LAW REVIEW, Vol. II. p. 363, Article by E. Irving Smith, entitled "Legal Aspect of the Southern Question."

"In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National Government from those of the State governments, and though this line has never been very well defined in public opinion such a division has continued from that day to this.

"The adoption of the first eleven Amendments to the Constitution so soon after the original instrument was accepted shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State and contiguous States for a determined resistance to the General Government.

"Unquestionably this has given great force to the argument, and added largely to the number of those who believe in the necessity of a strong National Government.

"But however pervading this sentiment, and however it may have contributed to the adoption of the Amendments we have been considering, we do not see in those Amendments *any purpose to destroy the main features or the general system*. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of the States with powers for domestic and local government, including the regulation of civil rights — the rights of person and of property — was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations on the States, and to confer additional power on that of the nation."

Thus grudgingly did the majority of the court in 1873 recognize a possible extension of the National powers.

In order to minimize this extension, a majority of the court in this case construed the words "privileges and immunities" in the Fourteenth Amendment to include only such privileges and immunities as pertain to the citizens in their relations to the National Government; e. g. such as the right of free access to the seaports and to the seat of government, the United States Courts, and the sub-treasuries, etc., as distinguished from the whole body of privileges and immunities which pertain to citizens in their domestic or every-day relations.

But this view did not escape severe criticism. In the case of *Butchers' Union Co. v. Crescent City Co.*,<sup>1</sup> decided ten years after

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<sup>1</sup> 111 U. S. 746.



the Slaughter-House Cases, Mr. Justice Field, in delivering a concurring opinion, took occasion to say: —

“The first section of the Amendment is stripped of all its protective force if its application be limited to the privileges and immunities of citizens of the United States as distinguished from citizens of the States, and thus its prohibition be extended only to the abridgment or impairment of such rights as the right to come to the seat of government, . . . which are specified in the opinion in the Slaughter-House cases as the special rights of such citizens.”

Mr. Justice Bradley in the same case says: —

“I hold that the liberty of pursuit — the right to follow any of the ordinary callings of life — is one of the privileges of a citizen of the United States.”

Again the majority of the Supreme Court of the United States have sought to belittle the effect of the Fourteenth Amendment by magnifying the Police Powers so called of the States, and placing the same in a considerable degree above the Constitutional provisions contained in that Amendment. We have a striking instance of this in *Powell v. Pennsylvania*,<sup>1</sup> one of the Oleomargarine Cases. But even in this case the Court recognized a limit to the power of the State. Mr. Justice Harlan says: —

“Nevertheless, if the incompatibility of the Constitution and the statute is clear or palpable, the courts must give effect to the former. And such would be the duty of the court if the State legislature, under the pretence of guarding the public health, the public morals, or the public safety, should invade the rights of life, liberty, or property, or other rights secured by the supreme law of the land.”

The language of Professor Thayer on this point is very pertinent: “As regards the Fourteenth Amendment it had for its main purpose that of cutting down the local legislative power of the States, their ‘police power,’ and conferring on the General Government the right to restrain them in exercising it.”<sup>2</sup>

Slow as the United States Supreme Court has been to interfere in behalf of the citizens of the States when oppressed by State legislation, the power to interfere must be now considered as well established. See *Chicago, &c. Railway Co. v. Minnesota*,<sup>3</sup> where

<sup>1</sup> 127 U. S. 678 (1887).

<sup>2</sup> Thayer's Cases on Constitutional Law, Part II. p. 742, note.

<sup>3</sup> 134 U. S. 418.

a State statute which deprived the plaintiff of its property without due process of law was held unconstitutional as being in conflict with the Fourteenth Amendment.<sup>1</sup>

- There is one point worth noticing in most of the cases which have come before the United States Supreme Court under these Amendments to the Constitution, and that is that from the very outset until the present time the decisions have been very often by a majority of the court only, and there has constantly been a considerable number of the Justices in favor of giving to these Amendments more of the effect which they seem properly entitled to have. With a further increase throughout the country of what we may call the National sentiment, and a few more changes in the membership of the court, we may at no very distant day expect to see the National Government with a strong arm protecting all the people from oppression by the States.<sup>2</sup>

*Hollis R. Bailey.*<sup>3</sup>

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<sup>1</sup> Constitutional History as seen in American Law, pp. 231-233 (1889). Lecture of Charles A. Kent.

<sup>2</sup> See *Strauder v. West Virginia*, 100 U. S. 303 (1879); *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *In re Lee Sing et al.*, 43 Fed. Rep. 359 (1890); *Scott v. McNeal*, 154 U. S. 34 (1894); *Portland v. Bangor*, 65 Me. 126 (1876); *The State ex rel. Garrahad v. Dering*, 84 Wisc. 585 (1893); in all which State laws were held unconstitutional as being in violation of the Fourteenth Amendment. See also *The State v. Loomis*, 115 Mo. 307 (1893); *Leep v. Railway Co.*, 58 Ark. 408 (1894); *Bradley v. Fallbrook Irrigation Dist.*, 68 Fed. Rep. 948 (1895); *In re Minor*, 69 Fed. Rep. 233 (1895); *People v. Warren*, 34 N. Y. S. 942 (1895); *In re Quarles and Butler*, 158 U. S. 532 (1895).

<sup>3</sup> Since the manuscript of the foregoing article was sent to the Editors, the writer has read with interest the article of William H. Dunbar, Esq., published in the *Quarterly Journal of Economics*, Vol. IX. No. 3, (April, 1895,) dealing with the same subject, and entitled "State Regulation of Prices and Wages."



## FEDERAL RESTRAINTS UPON STATE REGULATION OF RAILROAD RATES OF FARE AND FREIGHT.

### I.

#### INTRODUCTION.

NOTHING in the industrial history of the United States within the present century, phenomenal in many respects as that history has been, surpasses in extent or rapidity the growth of the railroads. When the Constitution of 1789 was adopted, there was no such thing known in the country as a railroad corporation; and, indeed, four decades more were yet to pass before the invention of the steam locomotive. In 1830 there were in the United States 23 miles of track; in 1840, 2,818; in 1850, 9,021; in 1860, 30,626; in 1870, 52,922; in 1880, 93,296; in 1890, 166,690; while in 1894 there were 179,279. In this last year, the number of locomotives employed was 36,293; the number of passenger cars, 27,909; the number of baggage, mail, and express cars, 7,937; and the number of freight cars, 1,191,884; making in all (locomotives and cars included) 1,264,023 pieces of rolling stock. The capital represented by this vast investment amounted to \$11,124,930,551, or the sum, on the average, of \$62,053 per mile, made up as follows: share capital, \$5,075,629,070; bonded debt, \$5,665,734,249; and other unfunded debt, \$383,567,232.

Litigation over matters relating to railroads, therefore, has not only naturally involved immense sums of money, and the interests of many thousands of investors, but also given rise, oftentimes, to most important questions of constitutional law. Among such questions are those of Federal and State legislative control, and the exact extent of each, and the vested rights of corporations. Many efforts, at different times, have been made by the several States to subject the railroads within their borders to a strict governmental supervision, and to regulate the rates of fare and freight to be charged thereon, while at times the legislation has proceeded so far, that, if constitutional, it would have absolutely wrecked the railroads which it affected. It has been therefore necessary, both for the

security of investors and for the good of the public, that some limitation upon the powers of the State legislatures guilty of such action should exist, and it will be interesting to inquire by what means and in what measure the railroads have escaped these threatened attacks, and to what provisions in the Federal Constitution or its Amendments their success is attributable. It will be found that the sole protection has resided either in the interstate commerce clause of the Constitution or the Fourteenth Amendment thereof relating to due process of law and the equal protection of the laws, and that the provision in the Constitution in regard to the impairment of a charter by a State legislature in the cases that so far have arisen has proved of no avail. It is a peculiar fact, which has often occurred, however, in the development of the history of the Constitution, and which has recently been commented upon by the Supreme Court in *In re Debs*, 158 U. S. 564, 590, that the clauses of the Constitution the interpretation of which has been invoked, although in no sense having changed their meaning, may be sought to be applied to a state of facts which did not exist, and was not contemplated, when the clauses were originally adopted. For example, in the present instance, as has been said, when the interstate commerce clause which forms part of the original Constitution was drafted, there was not a railroad within the whole area of the United States; and, so far as the Fourteenth Amendment to the Constitution, relating to due process of law and the equal protection of the laws, is concerned, that was adopted merely as a consequence of the war, and with a view solely to the *status* of the then recently freed slave. But, nevertheless, constitutional provisions are of universal, and not particular application, and, although unchangeable, operate frequently under different conditions and upon separate states of facts. To cite *In re Debs*, *supra*, at page 590: —

“Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

“Constitutional provisions do not change, but their operation extends



to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

## II.

### DEFINITION OF INTERSTATE COMMERCE.

It will be most convenient, for present purposes, to define first what transportation by railroad constitutes State, and what interstate commerce; and, in the discussion of the question, to divide such transportation into the following several possible classes: —

(1) Traffic taken up within a State and carried to another point therein; as, for example, a haul from A, in Massachusetts, to B, in Massachusetts.

(2) Traffic taken up within a State and carried to another point therein, but, upon the journey, transported through another State; as, for example, a haul from A, in Massachusetts, to B, in Massachusetts, passing through Vermont.

(3) Traffic through or across a State; as, for example, a haul from C, in Vermont, to D, in Connecticut, through or across Massachusetts.

(4) Traffic taken up inside of a State and carried without; as, for example, a haul from A, in Massachusetts, to C, in Vermont.

(5) Traffic taken up outside of a State and brought within; as, for example, a haul from C, in Vermont, to A, in Massachusetts.

(6) Traffic carried over a road wholly within a State, but in continuous transit from a point without said State to a point within, or from a point within to a point without; as, for example, a haul from A, in Massachusetts, to B, in Massachusetts, or from B, in Massachusetts, to A, in Massachusetts, over a Massachusetts railroad between said A and B, being part of a carriage, however, from C, in Vermont, to A, in Massachusetts, or from A, in Massachusetts, to C, in Vermont, over said Massachusetts railroad and another and separate railroad from said B to said C.

(1) *A, in Massachusetts, to B, in Massachusetts.* There can be no question that a carriage of this character is domestic commerce, and not interstate, and that the same is within the exclusive control of the State. *Wabash, St. Louis, & Pacific Railway Co. v. Illinois*, 118 U. S. 557. Miller, J., in this case, at page 564, says: —

“For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. . . . Both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration [a State statute], it is not subject to the constitutional provision concerning commerce among the States.”

The court here was speaking of a carriage in Illinois by an Illinois corporation, but the remarks would have held equally true of a carriage in the State by a United States corporation.<sup>1</sup>

(2) *A, in Massachusetts, to B, in Massachusetts, through Vermont.* A carriage of this character has been decided to be of the same nature as the preceding, and therefore to be State, and not interstate commerce. *Lehigh Valley Railroad Co. v. Pennsylvania*, 145 U. S. 192. The question in issue here was whether a tax by the State of Pennsylvania upon the gross receipts of a Pennsylvania railroad corporation was valid, if such receipts included the Pennsylvania portion of receipts arising from freight transported between two points in Pennsylvania, but in the course of transit carried through New Jersey. It was admitted, in the decision of the court, (*contra*, however, to the principle of *State Tax on Railway Gross Receipts*, 15 Wall. 284,) that a tax upon gross receipts was the same as a tax based upon the number of tons of merchandise hauled; and that, if the transportation in question consisted of interstate commerce, it was protected by the Constitution from taxation. In other words, the sole issue in the case was whether the facts as established presented a case of interstate commerce, or, to put the inquiry of the court itself, at page 201:—

“Is such intercourse consisting of continuous transportation between two points in the same State made interstate, because in its accomplishment some portion of another State may be traversed?”

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<sup>1</sup> *Union Pacific Railway Company v. Goodridge*, 149 U. S. 680. See also *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307, 334, 335.



And the court, by Fuller, C. J., answered the proposition in the negative, and held the tax to be constitutional.

The reason given for the decision is not wholly satisfactory, and furnishes no sufficient explanation of the result. An effort was made by the court to distinguish the case from the principle of *Coe v. Errol*<sup>1</sup> and *Lord v. Steamship Co.*,<sup>2</sup> but with questionable success. In the former case the court, by Bradley, J., said: —

“This question does not present the predicament of goods in course of transportation through a State, though detained for a time within the State by low water or other causes of delay, as was the case of the logs cut in the State of Maine, the tax on which was abated by the Supreme Court of New Hampshire. Such goods are already in the course of commercial transportation and are clearly under the protection of the Constitution.” (p. 525.)

The court, in *Lehigh Valley Railroad Company v. Pennsylvania*, *supra*, commenting upon the statement just quoted, observed: —

“These logs were also in course of transportation from the place of cutting to another place likewise in Maine, and, as that transportation required them to arrive and remain for a time in New Hampshire, the predicament in that regard was referred to in the opinion by way of argument, as being such that New Hampshire could not impose a burden on that transportation. But the right of Maine to tax them was not disputed.” (pp. 202, 203.)

It is difficult to understand why, if it was not disputed, it was therefore necessarily admitted, for the question was not discussed at all in the opinion, and the whole reasoning of the case would seem to indicate that Maine had not such a right. The theory which the court had in mind when it said that New Hampshire could not tax Maine logs passing through New Hampshire on the way from one point in Maine to another was, that they became part of interstate commerce from the date that they started in course of transportation; *Coe v. Errol*, *supra*; and if they had become such, it would follow of course that, while in course of transit, they were as much under protection from the laws of Maine as they were from those of New Hampshire. In any event, the effect of the *dictum* is to hold them to be unquestionably removed, after starting upon their journey, from the general mass of prop-

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<sup>1</sup> 116 U. S. 517.

<sup>2</sup> 102 U. S. 541.

erty of either State, and therefore free from State control; and there appears no way to reconcile the two cases in this particular.

Lord *v. Steamship Company*,<sup>1</sup> in *Lehigh Valley Railroad Co. v. Pennsylvania*, *supra*, was also distinguished, or rather overruled upon the ground upon which it had been decided, and supported upon another. That was a case in which the issue was whether Congress had the power to regulate the liability of the owners of vessels navigating the high seas, but engaged only in the transportation of freight and passengers between ports in the same State. Waite, C. J., in delivering the opinion of the court, rested it solely upon the commercial clause of the Constitution, and expressly omitted all reference to the judicial power of the United States over cases of admiralty and maritime jurisdiction. He said: —

“She [the *Ventura*] was navigating among the vessels of other nations, and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently with them was engaged in commerce. If in her navigation she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done. In every just sense, therefore, she was while on the ocean engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.”

The terms of the contract of carriage, therefore, were held to be subject to the control of Congress, and that although the transportation was between ports in the same State. The question, it is true, affected an instrument of commerce as well as a mere contract for carriage, but the reason that the transportation was held a transaction of interstate commerce was that the carriage was upon the high seas out of the jurisdiction of the State. It does not differ in principle from the case of goods passing out of a State and into it again while in continuous transit between two points in the same State, and if it is good law, *Lehigh Valley Railroad Co. v. Pennsylvania*, *supra*, is not. Undoubtedly, however, as the court says in the latter case, the decision can be justified on the principle of *In re Garnett*,<sup>2</sup> by holding the statute a modification by Congress of the general admiralty and maritime law, and the case is perhaps more properly based upon that

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<sup>1</sup> 102 U. S. 541.

<sup>2</sup> 141 U. S. 1.



ground. Nevertheless, there is no reason to say that it was improperly decided on the theory upon which the court rests it, or that a carriage of freight or passengers through one State in the course of a transportation between two points in another is not *ex necessitate* interstate commerce within the meaning of the Constitution. So far, however, as the *powers of taxation* of the State of the two *termini* are concerned, it must now be conceded that they have been specifically declared to extend to the *intrastate* part of the gross receipts from such a carriage without an invasion of the commercial clause of the Constitution.<sup>1</sup>

(3) *C, in Vermont, to D, in Connecticut, through or across Massachusetts.* This is plainly interstate commerce.<sup>2</sup>

(4) *A, in Massachusetts, to C, in Vermont.*

(5) *C, in Vermont, to A, in Massachusetts.*

There was never any question that the preceding two cases present instances of interstate commerce.<sup>3</sup>

(6) *A, in Massachusetts, to C, in Vermont, or C, in Vermont, to A, in Massachusetts, passing over a Massachusetts railroad, A to B, situate wholly within Massachusetts.* This case is presented in *Norfolk & Western Railroad Co. v. Pennsylvania*,<sup>4</sup> where the plaintiff in error was a corporation organized under the laws of both Virginia and West Virginia, with its road situate entirely within those States, but forming part of a through line starting in Pennsylvania and known as the Great Southern Despatch. The court said, at page 119:—

“That is to say, the business of the through line of railroad, of which the plaintiff in error forms a part or in which it is a link, consists, in a measure, of carrying passengers and freight into Pennsylvania from other States, and out of that State into other States. It certainly requires no citation of authorities to demonstrate that such business—that is, the business of this through line of railroad—is interstate commerce. That being true, it logically follows that any one of the roads forming a part of, or constituting a link in, that through line, is engaged in interstate commerce, since the business of each one of those roads serves to increase the volume of business done by that through line.”

<sup>1</sup> *Lehigh Valley Railroad Co. v. Pennsylvania*, *supra*.

<sup>2</sup> *Reading Railroad Co. v. Pennsylvania*, 15 Wall. 232, 280; *Fargo v. Michigan*, 121 U. S. 230, 241.

<sup>3</sup> *Reading Railroad Co. v. Pennsylvania*, 15 Wall. 232, 280; *Fargo v. Michigan*, 121 U. S. 230, 241; *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326.

<sup>4</sup> 136 U. S. 114.

## III.

## STATE REGULATION OF INTERSTATE RATES OF FARE AND FREIGHT.

The question of regulation of interstate rates of fare and freight by a State first arose in the Granger Cases, so called, decided by the Supreme Court in 1876.<sup>1</sup> The judges were divided in their opinions, Waite, C. J., Clifford, Miller, Bradley, Swayne, Davis, and Hunt, JJ., uniting as the majority of the court, and Field and Strong constituting the minority.

The first of the above cases, *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*,<sup>2</sup> involved the constitutionality of an act of the legislature of Iowa, establishing "reasonable maximum rates of charges for the transportation of freight and passengers" over the different railroads in Iowa. The complainant in the case was the lessee of the Burlington and Missouri River Railroad, which was incorporated under the laws of Iowa, and wholly situate therein, although it was also engaged in interstate as well as intrastate commerce. The question in issue, among others, was whether such a statute was necessarily unconstitutional, as being in conflict with the interstate commerce clause of the Constitution and the powers conferred thereunder upon Congress. The court, upon this point, said:—

"The objection that the statute complained of is void, because it amounts to a regulation of commerce among the States, has been sufficiently considered in the case of *Munn v. Illinois* [94 U. S. 113]. This road, like the warehouse in that case, is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern. It is employed in State as well as in interstate commerce, and until Congress acts the State must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected."

That is to say, the broad doctrine was here laid down, that until Congress acted the several States had plenary control over the

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<sup>1</sup> *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, 94 U. S. 155; *Peik v. Chicago & Northwestern Railway Co.*, 94 U. S. 164; *Lawrence v. Chicago & Northwestern Railway Co.*, *ib.*; *Chicago, Milwaukee, & St. Paul Railroad Co. v. Ackley*, 94 U. S. 179; *Winona & St. Peter Railroad Co. v. Blake*, 94 U. S. 180; *Southern Minnesota Railroad Co. v. Coleman*, 94 U. S. 181; and *Stone v. Wisconsin*, 94 U. S. 181.

<sup>2</sup> 94 U. S. 155.



regulation of railroad rates and fares, whether the same concerned interstate commerce or State commerce only.

*Peik v. Chicago & Northwestern Railway Co.*,<sup>1</sup> raised the question of the constitutionality of an act of the State of Wisconsin, fixing maximum rates of fare and freight. It was decided in the same manner upon the interstate commerce point as the preceding case. The railroad company here was incorporated under the laws of Wisconsin, and was engaged in interstate as well as intrastate commerce. The court said: —

“As to the effect of the statute as a regulation of interstate commerce. The law is confined to State commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, this may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without.”

And in another portion of the decision, the court, in defining the matter at issue, said: —

“These suits present the single question of the power of the legislature of Wisconsin to provide by law for a maximum of charge to be made by the Chicago and Northwestern Railway Company for fare and freight upon the transportation of persons and property carried within the State, *or taken up outside the State and brought within it, or taken up inside and carried without.*”

That is to say, the effect of the statute upon interstate commerce as well as State commerce was directly in issue, and one of the matters decided.

*Chicago, Milwaukee, & St. Paul Railroad Co. v. Ackley*,<sup>2</sup> related to a Wisconsin railroad, and presented no new point. *Winona & St. Peter Railroad Co. v. Blake*,<sup>3</sup> *Southern Minnesota Railroad Co. v. Coleman*,<sup>4</sup> and *Stone v. Wisconsin*,<sup>5</sup> were all cases of Minnesota corporations, and were decided on the same grounds as the foregoing.

The dissenting opinion in the *Granger Cases*<sup>6</sup> did not discuss

<sup>1</sup> 94 U. S. 164.

<sup>2</sup> 94 U. S. 179.

<sup>3</sup> 94 U. S. 180.

<sup>4</sup> 94 U. S. 181.

<sup>5</sup> 94 U. S. 181.

<sup>6</sup> 94 U. S. 181, 183.

the effect of the commercial clause of the Constitution, and therefore adds nothing to the present inquiry.

The Railroad Commission Cases,<sup>1</sup> decided in 1885, come next in order, but are inconclusive upon the question here, although they manifest no change as yet in the opinion of the court. These cases consist of *Stone v. Farmers' Loan & Trust Co.*<sup>2</sup>; *Stone v. Illinois Central Railroad Co.*<sup>3</sup>; and *Stone v. New Orleans & North-eastern Railroad Co.*<sup>4</sup>

*Stone v. Farmers' Loan & Trust Co.*<sup>5</sup> related to an act of the State of Mississippi, providing for the regulation of freight and passenger rates on railroads in that State, and creating a commission to supervise the same. The company affected was the Mobile and Ohio Railroad Company, a corporation which had been organized under the laws of Alabama, Mississippi, Tennessee, and Kentucky, being the several States through whose territory the Company's road passed. The court, by Waite, C. J., concerning the Federal question, said: —

"Every person, every corporation, everything within the territorial limits of a State, is, while there, subject to the constitutional authority of the State government. Clearly, under this rule, Mississippi may govern this corporation, as it does all domestic corporations in respect to every act and everything within the State which is the lawful subject of State government. It may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi."

And again: —

"The commission is, in express terms, prohibited by the act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one State to another. The statute makes no mention of persons or property taken up without the State and delivered within, nor of such as may be taken up within and carried without. As to this, the only limit on the power of the commissioners is the constitutional authority of the State over the subject. Precisely all that may be done, or all that may not be done, it is not easy to say in advance. The line between the exclusive power of Congress, and the general powers of the State in this particular, is not

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<sup>1</sup> 116 U. S. 307.

<sup>3</sup> 116 U. S. 347.

<sup>5</sup> 116 U. S. 307.

<sup>2</sup> 116 U. S. 307.

<sup>4</sup> 116 U. S. 352.



everywhere distinctly marked, and it is always easier to determine when a case arises whether it falls on one side or the other, than to settle in advance the boundary, so that it may be in all respects strictly accurate. As yet the commissioners have done nothing. There is certainly much they may do in regulating charges within the State, which will not be in conflict with the Constitution of the United States. It is to be presumed they will always act within the limits of their constitutional authority. It will be time enough to consider what may be done to prevent it when they attempt to go beyond."

As will be at once seen, the case went off on questions other than the Federal question concerning the scope of the commercial clause of the Constitution; while the dissenting opinions of Field and Harlan, JJ., dealt with yet other aspects of the controversy.

*Stone v. Illinois Central Railroad Co.*,<sup>1</sup> and *Stone v. New Orleans & Northeastern Railroad Co.*,<sup>2</sup> involved no questions which are of importance to the present inquiry, and need not be considered under this head.

In 1886, *Wabash, St. Louis, & Pacific Railway Co. v. Illinois*,<sup>3</sup> came before the Supreme Court, and in it the prior cases were carefully reviewed. The controversy arose over a statute of Illinois, providing a penalty for any railroad company charging or receiving, within that State, for transporting passengers or freight of the same class the same or a greater sum for any distance than it did for a longer. The defendant had made such discrimination in regard to goods transported from Peoria, Illinois, and Gilman, Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, although the former place was eighty-six miles nearer to New York. The Illinois act was held unconstitutional, so far as it applied to such commerce, notwithstanding that in its operation it was limited to that part of the voyage which lay within the State of Illinois. The court, by Miller, J., said:—

"If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois legislature to

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<sup>1</sup> 116 U. S. 307.

<sup>2</sup> 116 U. S. 352.

<sup>3</sup> 118 U. S. 557.

regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the statute under consideration, it is not subject to the constitutional provision concerning commerce among the States."

But, on the *contra*, in relation to interstate commerce, the opinion, in summing up, said: —

"We must, therefore, hold that it is not, and never has been, the deliberate opinion of a majority of this court, that a statute of a State which attempts to regulate the fares and charges by railroad companies within its limits for a transportation which constitutes a part of commerce among the States is a valid law."

The result of this decision was practically to overrule the Granger Cases, and the court merely differentiated this case from those by saying that the main point considered in the latter was not the commerce clause in the Constitution, but the provisions of the Fourteenth Amendment, and the further clause of the Constitution relating to impairment of contracts by a State, and that it was never the intention of the court consciously to hold that a regulation of interstate rates of fare and freight was within the powers of a State. On this subject the court said: —

"And the question how far a charge, made for a continuous transportation over several States, which included a State whose laws were in question, may be divided into separate charges for each State in enforcing the power of the State to regulate the fares of its railroads, was evidently not fully considered. . . . And the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges. [That is, the effect of the Fourteenth Amendment.] . . . The railroad companies set up another defence, apart from denying the general right of the legislature to regulate transportation charges, namely, that in their charters from the States, they each had a contract, express or implied, that they might regulate and establish their own fares and rates of transportation. [That is, a vested charter right.] These two questions were of primary importance; and though it is true that, as incidental or auxiliary to these, the question of the exclusive right of Congress to make such regulations of charges as any legislative power had the right to make, to the exclusion of the State, was presented,



it received but little attention at the hands of the court, and was passed over with the remarks in the opinions of the court which have been cited."

The judges concurring in the majority opinion were Miller, Field, Harlan, Woods, Matthews, and Blatchford, of whom Miller, J. alone took part in the decision of the Granger Cases; while those joining in the dissenting opinion were Bradley, J., Waite, C. J., and Gray, J., of whom Waite, J. and Bradley, J. took part in the Granger Cases, and with Miller at that time united in the majority opinion therein. The dissenting opinion of the three justices in the present case was based strictly upon the proposition, that *Peik v. Chicago & Northwestern Railway Co.*,<sup>1</sup> was conclusive of the subject, and that, until Congress acted, the States had power to prescribe rates of railroad fare and freight, so far as the same concerned interstate commerce. To quote the dissenting opinion reported in 118 U. S. 577, 588:—

"To sum up the matter in a word: we hold it to be a sound proposition of law, that the making of railroads, and regulating the charges for their use, is not such a regulation of commerce as to be in the remotest degree repugnant to any power given to Congress by the Constitution, so long as that power is dormant, and has not been exercised by Congress. They affect commerce, they incidentally regulate it; but they are acts in relation to the subject which the State has a perfect right to do, subject always to the controlling power of Congress over the regulation of commerce when Congress sees fit to act."

The case of *Wabash, St. Louis, & Pacific Railway Co. v. Illinois*<sup>2</sup> was cited without disapproval, in 1886, in *Fargo v. Michigan*<sup>3</sup>; and, in 1887, in *Bowman v. Chicago & Northwestern Railway Co.*,<sup>4</sup> and *Dow v. Beidelman*.<sup>5</sup> It was also cited with express approval, in 1893, in *Covington & Cincinnati Bridge Co. v. Kentucky*,<sup>6</sup> in these words:—

"In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the *Wabash case*, and to that doctrine we still adhere."

It may, therefore, be taken as well settled law to-day, that the States have no power of regulation over the charges for trans-

<sup>1</sup> 94 U. S. 164.

<sup>2</sup> 118 U. S. 557.

<sup>3</sup> 121 U. S. 230, 247.

<sup>4</sup> 125 U. S. 465, 494.

<sup>5</sup> 125 U. S. 680, 689.

<sup>6</sup> 154 U. S. 204, 217.

portation of interstate traffic, whether of passengers or freight. And such would be the case, if the Federal interstate commerce act were repealed.

#### IV.

#### STATE REGULATION OF STATE RATES OF FARE AND FREIGHT.

It remains to inquire whether, in the absence of a restriction upon the powers of a State by virtue of the commerce clause of the Constitution, there is any other restriction under the Constitution which can control such powers of the State, and here again there will be seen a gradual shifting away from the earlier decisions of the court, and a perceptible extension in the interpretation of the powers of the nation.

*First, with regard to the provisions of the Fourteenth Amendment to the Constitution relating to due process of law, and the equal protection of the laws.*

It was held, in *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*,<sup>1</sup> that, whenever the legislature saw fit to prescribe the maximum charge, the reasonableness of that charge could not be inquired into, but was finally determined by the act of the legislature. The court said, speaking of a railroad as a common carrier: —

“It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in, and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business. [That is to say, it is conclusive. *Munn v. Illinois*, 94 U. S. 113.] It was within the power of the company to call upon the legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.”

*Peik v. Chicago & Northwestern Railway Co.*<sup>2</sup> expressed a similar doctrine, holding as follows: —

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<sup>1</sup> 94 U. S. 155.

<sup>2</sup> 94 U. S. 164.

"Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change."

The doctrine was even more fully illustrated in *Chicago, Milwaukee, & St. Paul Railroad Co. v. Ackley*.<sup>1</sup> Here, the plaintiff, a railroad company incorporated in Wisconsin, had sought to recover for the transportation of property more than the maximum rate fixed by law for freight, by showing that the amount charged by the company was no more than a reasonable compensation for the services rendered, or, in other words, that the maximum rate fixed by the State was unreasonable. But such proof was held inadmissible, upon the theory that the decision of the legislature in the premises was final.

*Ruggles v. Illinois*<sup>2</sup> also is authority for a like proposition. It was there said: —

"This implies that, in the absence of direct legislation on the subject, the power of the directors over the rates is subject only to the common law limitation of reasonableness, for in the absence of a statute, or other appropriate indication of the legislative will, the common law forms part of the laws of the State to which the corporate by-laws must conform. But since, in the absence of some restraining contract, the State may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property, it follows that, when a maximum is so established, the rates fixed by the directors must conform to its requirements, otherwise the by-laws will be repugnant to the laws."

Justice Harlan concurred, but based his opinion upon other grounds, for he plainly was of opinion that the legislative determination of the question of reasonableness was not properly conclusive. Judge Field concurred, only because there was no proof made that the rate prescribed by the legislature was unreasonable, and, in the absence of proof, the presumption was that it was reasonable.

Furthermore, it was decided, in *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*,<sup>3</sup> that this right of regulation in the State was not lost by non-user; in *Ruggles v. Illinois*,<sup>4</sup> that the grant away by a State of such a right was never to be presumed; and

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<sup>1</sup> 94 U. S. 179.

<sup>2</sup> 108 U. S. 526.

<sup>3</sup> 94 U. S. 155.

<sup>4</sup> 108 U. S. 526.



in *Stone v. Farmers' Loan & Trust Co.*,<sup>1</sup> that words of positive grant, or those equivalent in law, were necessary.

In *Stone v. Farmers' Loan & Trust Co.*,<sup>2</sup> a majority of the court, through Waite, C. J., held, as before, that the State had authority to fix maximum rates of charges for transportation by railroad companies when the State was not expressly forbidden to do so by their charter contracts. The doctrine of the case, however, was somewhat modified by the statement that the extent of the power of the State was not unlimited, and was a subject, under certain circumstances, for the determination of the court. The opinion said: —

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretence of regulating fares and freights, the State cannot require a railroad corporation to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation or without due process of law."

Judge Harlan and Judge Field dissented, as in *Ruggles v. Illinois*, *supra*, although upon somewhat special grounds, and not for reasons here important.

In *Dow v. Beidelman* <sup>3</sup> it was decided that a statute of Arkansas, fixing at three cents a mile the maximum rate of fare upon a railroad, was not a taking of property without due process of law, even if, under an enforcement of such a statute, the net yearly income of the railroad fell to less than  $1\frac{1}{2}\%$  on the original cost of the road, and to only a little more than  $2\%$  on the amount of the bonded debt; that is to say, at least if there were no proof of the cost of this bonded debt, or the amount of the capital stock of the reorganized corporation, or the price paid by such corporation for the road. The case was put upon the distinct ground that the legal limitation of charge had not been proved to be unreasonable, and is a distinct departure from the doctrine of the Granger Cases.

In *Chicago, Milwaukee, & St. Paul Railway Co. v. Minnesota*,<sup>4</sup> a statute of Minnesota was held unconstitutional, which provided that the rates of charges for the transportation of property recom-

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<sup>1</sup> 116 U. S. 307.

<sup>2</sup> *Ibid.*

<sup>3</sup> 125 U. S. 680.

<sup>4</sup> 134 U. S. 418.

mended and published by the State Railroad Commission should be final and conclusive as to what were equal and reasonable charges, and which allowed of no judicial inquiry before the commission, or otherwise, as to the reasonableness of said rates. The majority opinion, written by Blatchford, J., contains the following: —

“In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the Supreme Court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness, both as regards the company, and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the law.”

Miller, J. concurred in a special opinion, and Bradley, Gray, and Lamar, JJ. dissented, saying, through Bradley, J., that the question was a legislative question, and not a judicial one, and expressing the opinion that the decision overruled the doctrine of the Granger Cases, as it undoubtedly does.

The principle of the preceding case, however, has never since been overruled, but, on the contrary, has been several times expressly approved.

For instance, in *Chicago & Grand Trunk Railway Co. v. Wellman*,<sup>1</sup> it was the opinion, that, while the legislature has power to fix rates, the right of judicial interference extends to a case of unreasonable rates.

And such is the doctrine of *Reagan v. Farmers' Loan & Trust Co.*,<sup>2</sup> where the cases upon the subject are reviewed by Brewer, J., who, however, is somewhat inaccurate in his expression of the scope of the decision in the Granger Cases. He there says: —

“It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons

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<sup>1</sup> 143 U. S. 339, 344.

<sup>2</sup> 154 U. S. 362.

or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized, that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter, and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. [But see *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*, 94 U. S. 155, and *Chicago, Milwaukee, & St. Paul Railroad Co. v. Ackley*, 94 U. S. 179.] The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation."

The same principle was also upheld in *St. Louis & San Francisco Railway Co. v. Gill*,<sup>1</sup> where the court says:—

"This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws. *Railroad Commission Cases*, 116 U. S. 307, 331; *Dow v. Beidelman*, 125 U. S. 681; *Chicago, Milwaukee, &c. Railway v. Minnesota*, 134 U. S. 418; *Chicago & Grand Trunk Railway v. Wellman*, 143 U. S. 339; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362."

And it was further decided, that the question of unreasonableness must be determined by the effects of the regulation by the State upon the earnings of the entire line of railroad within the State, as against all its legitimate expenses therein.

*Secondly, with regard to the provisions of the Constitution relating to impairment of contracts by legislation of a State.*

In *Chicago, Burlington, & Quincy Railroad Co. v. Iowa*,<sup>2</sup> the

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<sup>1</sup> 156 U. S. 649.

<sup>2</sup> 94 U. S. 155.



charter of the railroad involved, namely, the Burlington and Missouri River Railroad (wholly within Iowa), gave the latter power to contract, in reference to its business, the same as private individuals, and to establish by-laws and make all rules and regulations deemed expedient in relation to its affairs, but, on the other hand, subjected the said company at all times to such rules and regulations as the General Assembly of Iowa might see fit to enact. There was no special provision in the charter with reference to the fixing of rates by the railroad company, and the law as applicable under the circumstances was laid down as follows: —

“This company, in the transaction of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in, and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business.”

That is to say, where the grant to contract was general, and there was a power of amendment reserved in the State, a railroad company was subject to regulation by the State with regard to its State rates of fare and freight.

In *Peik v. Chicago & Northwestern Railway Co.*,<sup>1</sup> the charter provisions of a Wisconsin railroad entitled it “to demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall [should] deem reasonable.” The Constitution of Wisconsin in force when these provisions were enacted provided for the alteration or repeal by the legislature of all acts for the creation of State corporations. It was held in the decision, that said charter provisions, by their express grant, placed no limitation upon the powers of the State, and that the legislature thereof could prescribe a maximum of charges for the transportation by the corporation of persons or property within the State, or taken up outside the State and brought within, or taken up inside and carried without. *Lawrence v. Same*<sup>2</sup> presented identically the same question, and was similarly decided.

In *Winona & St. Peter Railroad Co. v. Blake*,<sup>3</sup> the railroad company was incorporated as a common carrier, with all the rights,

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<sup>1</sup> 94 U. S. 164.

<sup>2</sup> 94 U. S. 164.

<sup>3</sup> 94 U. S. 180.

and subject to all the obligations, as such. It was bound by common law, by its charter, and by the Constitution of Minnesota to carry passengers and freight for a reasonable compensation, but such obligation, the court held, in no wise added to or subtracted from the powers of the State, and the case was placed upon the same ground as the foregoing. *Southern Minnesota Railroad Co. v. Coleman*<sup>1</sup> was precisely similar.

In *Stone v. Wisconsin*,<sup>2</sup> there was a provision in the charter of the railroad company giving the State the right of alteration or repeal; and in this particular the case was like *Peik v. Chicago & Northwestern Railway Co.*<sup>3</sup> Even if, therefore, the legislature had granted the railroad company power to fix rates of fare and freight, the reserved rights of the State would have enabled it to effect an amendment.

In *Ruggles v. Illinois*,<sup>4</sup> the charter of the company provided that it should have the power to make such by-laws, rules, and regulations as were deemed necessary, provided that the same were not repugnant to the Constitution and laws of the United States, or the State; and, further, that the board of directors should have authority to establish such rates of toll as they should from time to time determine advisable by their by-laws. It was here held that the State had not parted with its right of control, inasmuch as a grant thereof was never to be presumed.

In *Stone v. Farmers' Loan & Trust Co.*,<sup>5</sup> the railroad charter conferred upon the incorporators power "from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation." The directors were also empowered to make by-laws, rules, and regulations touching the disposition and management of the company's property, and all matters appertaining to its concerns. It did not appear that there was anything here to show a special contract with the State exempting the railroad from State regulation, and therefore the State was held to have retained its ordinary legislative control. The court said:—

"Power is granted to fix reasonable charges, but what shall be deemed reasonable in law is nowhere indicated. There is no rate specified, nor any limit set. Nothing whatever is said of the way in which the question of reasonableness is to be settled. All that is left as it was."

In *Stone v. Illinois Central Railroad Co.*,<sup>6</sup> the language used in

<sup>1</sup> 94 U. S. 181.

<sup>3</sup> 94 U. S. 164.

<sup>5</sup> 116 U. S. 307.

<sup>2</sup> 94 U. S. 181.

<sup>4</sup> 108 U. S. 526.

<sup>6</sup> 116 U. S. 347.

conferring the powers corporate was, that the president and directors may "adopt and establish such a tariff of charges for the transportation of persons and property as they may think proper," and the same "alter and change at pleasure." This case was held to be entirely similar to the preceding, and was decided in the same way.

In *Chicago, Milwaukee, & St. Paul Railway Co. v. Minnesota*,<sup>1</sup> the charter of the railroad company authorized the directors thereof to make needful rules and regulations touching the rates of toll, and the manner of collecting the same, but it was held that such a grant did not deprive the State of its right of legislative supervision.

In *St. Louis & San Francisco Railway Co. v. Gill*,<sup>2</sup> it was decided that a special statutory exemption or privilege, such as immunity from taxation, or a right to fix and determine rates of fare, does not accompany the property of a railroad company in its transfer to a purchaser, in the absence of an express direction in the statute to that effect.

## V.

### CONCLUSION.

The following deductions may be made from the present state of the law in relation to charges for passengers and freight:

#### *Interstate Transportation.*

1. That the State, even in the absence of Federal legislation, cannot pass laws regulating interstate transportation.

2. That interstate transportation consists of the following: —

(a) Traffic taken up within a State and carried without, or taken up without and carried within;

(b) Traffic taken through or across a State;

(c) Traffic on a road wholly within a State, but in transit from one State to another.

3. That it does not consist of: —

(a) Traffic taken up within a State and carried to another point therein;

(b) Traffic taken up within a State and carried to another point therein, but upon the journey transported through another State; that is, at least, so far as relates to State taxation of the intrastate portion of the gross receipts from such a carriage.

<sup>1</sup> 134 U. S. 418.

<sup>2</sup> 156 U. S. 649.



*State Transportation.*

1. That a State, in the matter of intrastate traffic, retains power of control over the same, unless said control has been bargained away by express grant.

2. That the presumption always is against such grant.

3. That a State, in the exercise of its power of control, is prohibited by the Constitution of the United States from reducing fares or freights below reasonable rates, and that the Federal courts, and not the State legislatures, are to be the final judges of what is reasonable.

The result is, therefore, that a very large measure of protection is afforded to the railroads through the medium of the Federal Constitution. So far as interstate commerce is concerned, no State can interfere with that, for it lies exclusively within the national domain; while, so far as relates to State commerce, that is subject to the limitation that no State, under cover of legislation, can deprive a railroad of its property without due process of law, or deny it the equal protection of the laws. As has been seen, the Supreme Court did not arrive at this conclusion at once, or without something of hesitation. When, in 1876, the Granger Cases were decided, there was not that disposition to give the clauses of the Constitution the ample breadth of construction which they have since received. The propriety of the change in the Court's attitude, however, cannot be doubted. Possibly nothing has done more to sustain the value of American railroad securities, or to create greater confidence therein, than the knowledge that beyond and above the sovereign power of the State there is the supreme authority of the nation over interstate as well as foreign commerce; while beyond and above that is the ultimate, final doctrine of vested rights, which neither State nor nation, jointly or separately, can invade or impair. Constitution, Art. I., section 8, clause 3; Amdt. XIV., clause 1; Amdt. V.

*William F. Dana.*

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It is good news, and authentic, that the printing of the Year Books is to be resumed. The work of supplementing and filling the gaps in the old Year Books had been carried on as far as the 15th Edw. III. in 1891. For some unexplained reason nothing has appeared since. But now Mr. Pike is to be allowed to resume his admirable work of editing; and it may be hoped that it will not be stopped again until we have not only the gaps all filled in the old books, but an edition of the black-letter volumes themselves which is worthy of their new companions.

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ON November 27 last, a local historical society in Boston celebrated by an address at the Old South Church the six hundredth anniversary of the British Parliament summoned by Edward I. It is strange that the anniversary of an event of such importance in the history of popular government should have been so little recognized. The oration in Boston was by A. C. Goodell, Jr., the learned editor of the Province Laws. One hazards little in guessing that the chairman of the committee of arrangements for the Boston celebration, Prof. M. M. Bigelow, distinguished for many contributions to historical and legal knowledge, was the moving cause in this event. The exercises were introduced by a neat and appreciative short address by him.

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THE address on Legal Education by the Lord Chief Justice of England, delivered in Lincoln's Inn Hall at the request of the Council of Legal Education on October 28 last, is a paper of first rate importance. It confesses to the full, with illustrations, the extremely poor condition of English legal education, as contrasted with what is found on the Continent and in this country, and urges the establishing of a great and worthy school of law. "Is it," asks Lord Russell in his closing words, "an idle dream to hope that even in our day and generation there may here arise a great school of law worthy of our time, — worthy of one of the first and noblest of human

sciences, to which, attracted by the fame of its teaching, students from all parts of the world may flock, and from which shall go forth men to practise, to teach, and to administer the law with a true and high ideal of the dignity of their mission?" Admirable words! To many of the lovers of England and English law, it has long been a wonder that this consummation is so long delayed. It is devoutly to be wished that Lord Russell may now press the matter to a conclusion; nothing would bring more benefit to the law of his country, or more honor to himself and the great office which he holds.

Lord Russell's specific proposition is the establishing by royal charter of "The Inns of Court School of Law." The governing body is to consist of thirty members, ten named by the Inns, ten by the Crown, one each by the Lord Chancellor, the Lord Chief Justice, and the Master of the Rolls, one each by the four Universities of Oxford, Cambridge, London, and Victoria, and three by the Incorporated Law Society. "I should confer on such a body the granting of academic distinctions, and I should commit to it in fullest confidence the settling of a scheme of preliminary examination, of systematic instruction, and of final tests of fitness for the profession of the law. . . . To the Inns of Court, I need hardly say, we must mainly look for the funds to carry on the work in worthy fashion. . . . In the existing system the annual expenditure amounts to some £7,000. If the lectures and classes are made attractive, I doubt whether any larger sum, or, at all events, any substantially larger sum, would be required to work the scheme which I advocate."

This is suggesting what would be equivalent here to an endowment of say \$1,000,000. The existing permanent endowment of the Harvard Law School is a little under \$250,000.

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**THE SELDEN SOCIETY.** — The Selden Society has shown commendable energy in overcoming past delays in its publications, and the issue of the selection of Coroner's Rolls, edited by Dr. Gross of Harvard University, will bring them up to date. Advance sheets of this last are now at hand. From these it appears that the volume will be an interesting one, and a great aid to the study of the functions of the Coroner, and of the history of the decay of his office from the time that it was held only by landed knights elected by the shire (furnishing perhaps the machinery for sending later such knights to Parliament) up to the early falling into disrepute of the crown's quest law and the recent rather ridiculous position of the office.

The subjects of inquests afford peculiar scope for dramatic effects, to which the style of the verdicts lends itself. For example, one reads that "Margaret went with a certain jug of the value of one penny to draw water from the said well in the said close and by chance slipped and fell into the said well and sank, and ill is thought of no man for the death of the said Margaret." Any one interested in the old crimes and the old modes of trial will find much that is new in these Rolls. The Selden Society deserve all praise and support for their services to the history of the common law.

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**REFORM IN LAW REPORTING.** — If Coke in his day lamented the existence of so many as fifteen volumes of reported decisions, what is to be said



of the present state of affairs, when these volumes are to be counted by tens of thousands, and this vast number is being yearly augmented? It is a full recognition of the evil of this multiplicity of reports that has led the American Bar Association to constitute a permanent "Committee on Law Reporting and Digesting." Systematic efforts are henceforth to be made by the Committee toward preventing the duplication of State and Federal reports, and toward securing, too, more uniformity among reporters in the construction of both the index and the case syllabus. The Committee, as stated in their report submitted at the meeting of the Bar Association held at Detroit last August, sent a circular letter to the various official court reporters, — sixty-five in all. The answers, besides furnishing valuable data as to the defects in the present varying systems of reporting, reveal a nearly unanimous desire on the part of the writers for a convention of official reporters. In such a convention under the auspices of the Committee, there is a strong likelihood of inaugurating far-reaching and uniform remedial measures.

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THE TORRENS LAND TRANSFER SYSTEM ON TRIAL. — At the recent election in Cook County, Illinois, it was voted to adopt the provisions of the Land Transfer Act passed by the last legislature. This brings the city of Chicago within the operation of the act. Although several States have at different times appointed commissioners to investigate the so-called "Torrens" land transfer system, that is, a system of transfer of land by record of title, it is now for the first time to be given a trial in this country. The merits and demerits of the system have been pretty well threshed out, and the consensus of opinion is strongly in its favor as an original question. As a powerful plea, however, against introducing it, it is urged that the conditions that have secured its success in a new country like Australia are lacking here; chiefly because the land, in our older States at least, is not under government ownership, which would permit the government to inaugurate without inconvenience such a system of transfer, but is parcelled out among a multitude of private landholders; and it is repugnant to them, long accustomed to our system of deed registration, to risk their land titles by a radical change in the methods of transfer. A demonstration, however, by actual test, that the transfer by record of title is capable of successfully supplanting our present methods will go a long way toward answering these conservative objections. The success of the Illinois experiment therefore probably insures like action in other States. In this lies its importance.

The act, while modelled upon the Torrens system as it exists in Australia, differs in one important respect. The first registration does not give absolute title; it confers possessory title merely; but as a result of a short period of limitation provided for in the same act, this possessory title becomes absolute, in the absence of adverse claims filed in the mean time, at the end of five years. Thus, by a little postponement of the time when the full benefit of the act is to be realized, the title is made absolute in a manner already familiar in this country; and there is no danger that the true owner's title may be summarily divested. As a result, too, the expense of an exhaustive examination of title, which necessarily precedes any registration conferring absolute title, is avoided.

The act has the merit also of excluding unnecessary detail. It leaves to the administrative officers the main burden of working out the details for carrying its provisions into effect. It was the heaping of detail on detail

that contributed to make the majority report of the Massachusetts Commission in 1892 objectionable. It may be questioned, however, if the act in its failure to make registration compulsory does not stop short of effecting the best results. The option given to landholders to transfer by deed as heretofore, or by record of title, is in effect the establishment of a dual system of transfer. Such a system was emphatically pronounced "unworkable" by an English Commission in 1868. Even though the dual system be not unworkable, compulsory registration of title possesses marked advantages. It certainly hastens the time when all land titles shall be conclusively evidenced by registration. Information as to the working of the Illinois act will be eagerly awaited.

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IN a recent note on *Greenwood Ice & Coal Co. v. Georgia Home Ins. Co.*, 17 So. Rep. 83 (Miss.), 9 HARVARD LAW REVIEW, 218, the case of *New York Central Ins. Co. v. National Protection Ins. Co.*, 14 N. Y. 85, was cited, but the following recent New York decisions which have kindly been furnished by the Hon. William M. Ross of the Onondaga County bench were overlooked: *Pratt v. The Insurance Co.*, 130 N. Y. 206; *Empire State Ins. Co. v. American Central Ins. Co.*, 138 N. Y. 446; *Knaus v. Gottfried Krueger Brewing Co.*, 142 N. Y. 70; *Bank of New York Ass'n. v. American Dock & Trust Co.*, 143 N. Y. 559.

An examination of these cases shows that the test now applied by the New York courts as to whether an agent may represent both parties is whether or not he is invested with discretion. No other jurisdictions seem to have recognized this distinction. Contracts made by the agent as representing both parties are held voidable, regardless of lack of discretion in the agent, and the agent is not allowed to recover commission from either party in absence of their knowledge of the dual agency. *Connel v. Smith*, 142 Pa. St. 25; *Rice v. Wood*, 113 Mass. 133; *Berlin v. Farwell*, 31 Pac. Rep. 527 (Cal.); *Bell v. McConnell*, 37 Ohio St. 396; *Kronenberger v. Fricke*, 22 Ill. App. 550; *Salomons v. Pender*, 34 L. J. Ex. 95. But see *Hammond v. Bookwalter*, 39 N. E. Rep. 872 (Ind.). The test of discretion is distinctly repudiated in *Porter v. Woodruff*, 36 N. J. Eq. 174, and *Fansen v. Williams*, 55 N. W. Rep. 279 (Neb.).

As to the agent's right to commission from both parties where he simply introduces them and they make their own contract, see *Montraso v. Eddy*, 94 Mich. 100; *Green v. Robertson*, 64 Cal. 75.

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ISSUE LIVING — CHILD EN VENTRE SA MÈRE. — *In re Burrows*, [1895] 2 Ch. 497, a recent English case, raises a point of interest and significance. The case turned upon the construction of a will, which devised property to A for life, and upon her death to B, for her absolute use and benefit in case she have issue living at the death of A; "but in case she has no issue then living," then over. At the time of A's death, B was *enceinte*, and the following day gave birth to a living child. The question thus sharply presented on the facts was, whether the child *en ventre sa mère* was "issue living" within the meaning of the will. Chitty, J., who sat as judge, refusing to distinguish between "child" and "issue" as an over-refinement, held that the child was to be deemed living at the death of A, for the benefit, not of the child, but of B.



The result reached by the court, although going far beyond the generally stated rule, that a child is treated as born when for his benefit, is certainly supported by cases arising under the rule against perpetuities (Gray on Perp., §§ 220-222), if not by others. An important case in this connection is that of *Blosson v. Blosson*, 2 D. J. & S. 665, where an opposite conclusion was arrived at. There, however, the phrase was "born and living," practically contrasting birth with life; and, besides, the consequences of regarding the unborn child as born would have resulted in postponing his enjoyment of certain property for years, a decided detriment, instead of benefit, to the child. The effect of that decision may, therefore, be limited to cases which would have an injurious influence on the interests of the infant *en ventre sa mère*. On the broader question of whether the child is to be treated as alive or not, when his interests are not concerned, there is little if any authority against *In re Burrows*. The cases under the rule against perpetuities are, perhaps, to be specially justified by the arbitrary nature of that rule and the better fulfilment of the testator's intention by such an extension of time. At the bottom, however, the notion is the same, and the refusal to include the living though unborn child under the words "issue or child living," in most cases, defeats the real meaning of the testator. Historically, perhaps, the law has looked at this from a different point of view, but, in logic and reason, would not the other attitude be the better, to consider the issue which by the course and order of nature is a living thing, as alive, unless some good grounds be shown, as in *Blosson v. Blosson*, for holding otherwise?

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WHO CAN QUESTION A DEVISE TO A CORPORATION?—The Court of Appeals of Maryland has just been called upon to take sides on the question whether the power of a corporation to take by devise more property than is allowed it by its charter can be questioned by the testator's heirs, or only by the State. The court recognized the existence of the two doctrines and chose the latter, adopting the view of the United States Supreme Court in *Jones v. Habersham* (107 U. S. 174) rather than that of the New York court in *In re McGraw* (111 N. Y. 66). As a matter of authority, the choice was with the weaker side. In the Supreme Court case, the question seems to have been passed over without much consideration, for no reasons are given to support the proposition, and the authorities cited are not in point; moreover, the circumstance that the case did not require a decision on this subject confirms the impression that the court did not give the matter its serious consideration. In the New York case, on the other hand, the subject was thoroughly investigated; the point was squarely involved, over a million dollars were at stake, and counsel and court were profuse in their researches. The New York decision appears to have been followed by nearly every court which has had actually to pass upon the question; the judges who have expressed *dicta* to the contrary seem, like the Supreme Court, to have taken the matter largely for granted, and to have failed to make an important discrimination.

The confusion seems to arise from treating a taking by devise on the same footing as a taking by deed. Whether there is any true ground for the distinction may be a matter of dispute, but it will at least aid in a clearer understanding of the subject if the two questions are not treated as identical. As to a conveyance by deed where a corporation is forbidden to take the



property, it seems to be settled that such a transfer can be questioned by no one but the State. From this it is assumed that only the State can interfere in the carrying out of a devise. But why is it that a grantor cannot question his grant? He has seen fit to pass his property out of his own hands into the hands of the corporation, and he cannot afterwards be heard to say that the corporation was not capable of receiving the property. The law so far recognizes the existence of the corporation's power to take the grant, that it will not interfere to undo for the benefit of an individual that which the individual has voluntarily done. One should not say, perhaps, that the grantor is estopped from questioning the grant, because the elements of a true estoppel are lacking; but one can say that where such a transaction is executed, where everything has passed between the parties themselves, and all is completed, the law will not move itself to disturb the *status quo*.

When it comes to giving effect to a devise, the law is put in a far different position. Instead of being allowed to stay its hand, it is asked to take an active part in transferring to a creature of its own making property which it has forbidden that creature to take. Before, the transaction had been executed, and the law chose not to disturb it; now, the property has yet to pass to the corporation, and the law is called upon to declare positively that it shall so pass. That the law should, as in this second instance, refuse to take part in a forbidden act, appears to be in accordance with both the dignity of the judiciary and the intention of the legislature.

Whenever the question comes up before the Supreme Court of the United States for a decision, an interesting circumstance will be that the judge who delivered the opinion in the *McGraw* case was Mr. Justice Peckham.

**CUSTODY OR POSSESSION.**—In *Holebrook v. State*, 18 S. R. 109, the Supreme Court of Alabama seems not to distinguish between possession and custody. The indictment was for larceny. The prosecuting witness hired the defendant to convey him to a railroad station. Arriving there, he left with the defendant a quilt, which the defendant agreed to return to the house of the witness. Instead, the defendant sold it. The court sustained the verdict of guilty, on the ground that the defendant was not given possession, but mere custody.

The court recognizes the established rule of the common law that there is no larceny without trespass to possession, but takes it for granted that the defendant received only custody of the property. The reason for this assumption is not clear, unless it can be gathered from a passage from *Rosc. Cr. Ev.* § 646, which the court quotes without comment. This is merely a statement of the rule that, where a master delivers goods to a servant, the servant has only the custody of the goods. Obviously, it has no bearing on the case under consideration. Here, though it is often difficult to determine just what are the limitations of the doctrine of master and servant, there was obviously no such relation. The defendant was exactly in the position of a private carrier, and as such received the possession, not the custody, of the property. Doubtless the court was moved by the fact that, whether the defendant was convicted of larceny or embezzlement, his penalty would be practically the same, and to avoid further litigation sustained the conviction of larceny. But this seems no excuse for direct departure from principle. It was to cover just such cases as this that the Statute

of Embezzlement was passed in England, under which a prisoner, who would escape under the technicalities of the law of larceny, might be convicted. See 6 HARVARD LAW REVIEW, 244.

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PREScriptive RIGHT TO COMPEL REPAIRS. — A somewhat startling proposition in the law of easements is laid down in the case of *Whittenton Manufacturing Co. v. Staples*, 41 N. E. R. 441 (Mass.), FIELD, C. J., HOLMES and LATHROP, JJ., dissenting. It is to the effect that, in consequence of payment by owners of land for more than twenty years of an annual sum of money toward the repair of the dam situated off the premises, the land thereby becomes subject to a servitude to pay that sum annually. The decision is based on the analogy of the duty to repair a dam to the duty to repair fences and highways. The primary conception of an easement is a right to use another's land: it is a burden imposed upon the land itself, and gives the owner of the easement a right *in rem*. The duty of the owner of the servient estate is the same as that of all other members of the community, merely to refrain from interfering with the use of the easement. Unfortunately, the law has allowed a landowner to acquire by prescription, or by grant, certain rights, which are not accurately rights in the land of another compelling a passive duty of non-interference merely, but are rights compelling positive acts by the dominus of the servient estate.

In these cases, the land is not subjected to use, but the owner, by reason of holding the land, is compelled to do positive acts. A right to compel the performance of positive acts is known as a spurious easement: and up to this time has been strictly confined to three classes of cases. The law has recognized the right to compel the repair of fences; repairs in connection with the enjoyment of an existing easement (*Ryder v. Smith*, 3 T. R. 766); and repairs to be made upon the highway by abutting owners (Bac. Abr., Highways, E.). It is doubtful if the last mentioned right was ever recognized in the United States previously to the decision in the recent case of *Middlefield v. Knitting Co.*, 160 Mass. 267. The question in the principal case concerns the extension of these exceptional easements. There are two strong objections. In the first place, the analogy between repairs on a dam situated on the land of a stranger and repairs to fences and highways is not complete. In each of the spurious easements noted above, acts are to be done on the servient estate; or at least, in each case the act to be done is closely bound up with the use of his land by the owner of the servient estate. But, aside from this imperfect analogy, the creation of rights in the nature of easements — varying widely, however, from the primary conception of easements, that of a subjection of the land itself — has gone far enough. It is to be regretted that such rights — anomalies at best — were ever allowed to creep into the law; and on principle they ought not to be extended beyond their present well defined limits. It is conceivable, perhaps, that strong reasons of public policy would justify the extension which the court tries to make in the present case; but Field, C. J., in his dissenting opinion, forcibly replies to arguments of this nature that "secret liens or interests in land, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, ought not to be extended." With authority and reasons of public policy against the decision, it has little left to support it.

The Massachusetts court would certainly support a covenant to pay this



money, even though in so doing it would probably go beyond the doctrine of *Savage v. Mason*, 3 Cush. 500. There, the covenant was to pay for the privilege of using a party wall, and was connected, it would seem, with the enjoyment of an easement, in this case, a right to retain the wall on land of the covenantor and his assigns.

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**WAIVER OF CONSTITUTIONAL RIGHT TO TWELVE JURORS.** — The Supreme Court of New Mexico has just decided that the United States constitutional guaranty of a jury trial in all criminal prosecutions cannot be waived by one indicted for a felony, so as to make valid a trial by eleven jurors. *Territory v. Ortiz*, 42 Pac. Rep. 87.

Most of the American State constitutions contain similar guaranties, which have been generally interpreted to prohibit statutes compelling the defendant to submit to trial by any number of jurors less than twelve. As regards the defendant's ability to waive this right, the authorities are divided. Although in minor offences the defendant is generally allowed to waive the right even in the absence of statutes permitting it, he is not allowed at common law to waive the right in case of felonies; and statutes permitting waiver of the right in such case are in some States held unconstitutional. Nowhere is waiver of this right permitted in capital cases.

One argument suggested against allowing the defendant to waive his constitutional right to a trial by a full panel has been that the State is concerned to preserve the lives and liberties of its citizens, and therefore it will not suffer them to consent to a form of procedure that may lessen their chances of acquittal. *Cancemi v. People*, 18 N. Y. 128. But in *Comm. v. Dailey*, 12 Cush. 80, Chief Justice Shaw points out that in any particular case the defendant's chances of success in a present trial with eleven jurors may be greater than in a future one with twelve, as where certain evidence is now available that may not be in the future; and that the defendant and his counsel can be safely trusted not to prejudice his interests. Judge Cooley contends, however, upon better ground, that a tribunal of less than twelve jurors is unknown to the law; that it amounts merely to a species of arbitration to decide whether the accused has been guilty of an offence against the State. Cooley, Const. Lim. (6th ed.) 391. The finding of such a tribunal, not constituted according to law, is of course shorn of legal effect. Bulwarked by this reasoning, the result of the principal case and kindred decisions seems fairly impregnable.

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**THE NATURE OF RAILROAD TICKETS.** — Two recent cases in minor courts bring up interesting questions concerning the nature of railroad tickets. In *Evansville & T. H. R. R. Co. v. Cates*, 41 N. E. Rep. 712, the Appellate Court of Indiana held that where a passenger demands and pays for a ticket to A, and by a mistake of the ticket agent is given a ticket to B only, with which he enters the train without noticing the error, he has a right to ride to A on making proper explanation to the conductor; and can recover from the company for ejection by the conductor at B. This case is not without support (see *Georgia R. R., &c., Co. v. Dougherty*, 86 Ga. 744; 3 Wood on Railroads, § 349); but the weight of authority is against it, and it seems to have no foundation in principle. It involves a misconception of the true character of a railroad ticket. If it were true that the



passenger made his contract with the ticket agent and the ticket was handed over merely as a receipt, then he would perhaps have had a contract right to be carried to his intended destination. But, as was pointed out in 1 HARVARD LAW REVIEW, 17, the ticket agent has no authority to make contracts, — his duty is merely to sell tickets. The ticket is the contract, and by its terms the passenger is bound; and in a case like that under discussion, while he doubtless has a right of action against the company for selling him the wrong contract, he has no action for being put off the train at the terminus provided by that contract.

Courts have fallen into error, it would appear, from failure to distinguish between the case of a ticket which is, on its face, not good for the journey intended by the passenger, and that of a ticket which is apparently good for the intended journey, and declared to be so by the ticket agent, although by the regulations of the company it is in fact not good. In the latter case the contract is ambiguous, and the passenger, under the circumstances, surely has a right to insist on the interpretation given by the company's agent; but that is no reason why he is not bound by the ticket in the former case, where the interpretation of the contract is perfectly clear. (See Hutchinson on Carriers, § 580, *f*.)

The analogy between railroad tickets and bills and notes has often been remarked, and is treated of at length in the article in the HARVARD LAW REVIEW referred to above. A ticket is not a consensual but a formal contract; and although assignable in the absence of words of limitation, it is, like other negotiable instruments, not assignable in part. The second of the two recent cases is of note in this connection. In *Curlander v. Pullman Palace Car Co.*, a case decided in the Superior Court of Baltimore, and reported in 28 Chicago Legal News, 68, the novel question was raised as to the right of a purchaser of a sleeping car section, who leaves the train before reaching his destination, to transfer the use of the section to another passenger for the rest of the journey. The court held that he had that right. This decision can apparently be supported only on the ground that a sleeping car ticket is radically different from a railroad ticket; that it is not a formal contract of transportation, but rather evidence of the purchase of certain space in the sleeping car for the specified journey. The existence of so marked a distinction between the two sorts of ticket may well be doubted.

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THE RIGHT TO PRIVACY — THE SCHUYLER INJUNCTION. — The case of *Schuyler v. Curtis*, before noticed in its earliest stage in 5 HARVARD LAW REVIEW, 148, has been finally adjudicated by the Court of Appeals of New York in favor of the defendant. The bill was for an injunction to prevent the defendants from completing a statue of a deceased lady of whom the plaintiff was the nephew and step-son, and from displaying it first at the World's Fair under the title of "The Typical Philanthropist," and then in the rooms of the Ladies' Art Association in New York. Mr. Justice Peckham in dismissing the bill took especial care to say that the decision could not be taken as a denial of the right to privacy, or of that altogether independent right which the next of kin of a deceased person might have in the privacy of that person's past life, and he put the decision upon the ground that in the case in question there were no circumstances which gave the plaintiff good reason to pray for an injunction. The reasoning was that the deceased could not have shrunk from the anticipation of a publicity after her

death, however much she might have done so had it been attempted during her life, and that consequently no evidence of her desire to avoid publicity could be relevant to the plaintiff's case. Further and in general the statute was not to be used in any way which could give a "sane and reasonable person" any complaint on his own account, though he were her nearest relative.

Reduced to its formal parts the decision would therefore seem to be a denial only of equitable jurisdiction, and not of the plaintiff's legal right. It may be fairly said that the court admitted that a tort was proposed by the defendant, but found no sufficient reason for giving the extraordinary remedy of a court of equity, and left the plaintiff to his remedy at law. The case is quite new in its particular features, since the injunctions previously granted, *e. g.* against the reproduction of photographs, publication of letters, and the like, were all cases where the defendant proposed to give a publicity for his own profit, regardless of whether it was calculated to do honor to the plaintiff or not. Moreover, this was a case where equitable jurisdiction cannot be said to flow necessarily from the facts, as in the case of a proposed tort to land, but is rather analogous to a bill for the recovery of a chattel in specie, depending upon its particular circumstances for equitable jurisdiction. In the exercise of its discretion in cases of this sort, a court has such latitude that it is impossible, or at least presumptuous, to say it has come to a wrong decision unless that be obviously absurd and unreasonable. So in this case the decision of the court must be held to be justified even by those who might disagree with the result, had it been their place to decide the case, for there is surely nothing preposterous or absurd in saying that here the plaintiff's loss could be sufficiently compensated by money damages.

But the reasoning of the court, with all respect to the learned judge who delivered the opinion, is not altogether satisfactory. Since the question before them was not to be governed by the decisions of the lower courts, and their position was not that of reviewing the decision of an independent tribunal, *e. g.* the verdict of a jury, there was no occasion to hold that no "sane and reasonable person" could uphold the decision of those lower courts, and it was a statement which their very unanimity in combination with the vigorous dissent in the Court of Appeals itself ought to have effectually disproved.

Further, the line of reasoning by which the plaintiff's evidence of the deceased's dislike of publicity was excluded as irrelevant to his own proof of damages can be assented to with difficulty. It is surely a mistaken view of the ordinary facts of human feeling to say that a naturally retiring person can tolerate the anticipation of a publicity after his death from which he would shrink painfully during his life. Surely a person to whom privacy is of any value whatever must contemplate a future publicity with almost as much chagrin as a present one. Could the learned judge, for example, bear for an instant the thought of a public representation or description of his courtship after his death? Now if this is so, the knowledge of how great annoyance would have been caused to the deceased, had she had knowledge of the defendant's proposition, was a very material element in the plaintiff's damages, for surely it is a source of pain to every normal person to know that that is contemplated which would have caused suffering to any one dear to him, who is now dead. Indeed, it is unnecessary to give proofs of that feeling, they are so obvious.

Finally, the case seems a good instance of the ill effects of the loose sys-

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tem of pleading used in New York. It is doubtful whether the decision would have been received by the press in general, as it has been, as a denial of the right to privacy, were the jurisdictions of law and equity distinguished, and certainly it would have been more easily limited to its proper scope. As has been intimated, it cannot fairly be complained of, however much some of the reasoning of the opinion may seem to need further exegesis to gain acceptance.

## RECENT CASES.

**AGENCY — LIABILITY OF SERVANT TO THIRD PERSONS.** — The agents of a corporation charged with the duty of erecting on its grounds structures for the accommodation of the public negligently permitted a defective structure to be erected. *Held*, that they were guilty merely of nonfeasance, and therefore were not liable to persons injured by reason of such defects. *Van Antwerp v. Linton et al.*, 35 N. Y. Supp. 318.

There is no doubt that when an agent is guilty merely of nonfeasance he is responsible therefor to his principal alone. *Lane v. Cotton*, 12 Mod. 472; *Felton v. Swan*, 62 Miss. 415. It is when we attempt to draw the line between nonfeasance and misfeasance that the question becomes a puzzling one. The court here follows previous decisions in New York, as well as the weight of authority in other jurisdictions, in limiting the definition of misfeasance to the violation of a duty imposed upon the agent independently of his employment. *Burns v. Pethcal*, 75 Hun, 437; *Delaney v. Rochereau*, 44 Am. Rep. 456. By the terms of this definition, nonfeasance only can be attributed to the defendants; and there would seem to be no good distinction between the negligent performance and the negligent omission of performance of a duty imposed by an employer, when in both cases injury results to third persons. The authorities are not wanting, however, which declare the first to be misfeasance, and the second nonfeasance. *Osborne v. Morgan*, 130 Mass. 102.

**BILLS AND NOTES — ANOMALOUS INDORSEMENT — GUARANTOR — STATUTE OF FRAUDS.** — Defendant indorsed in blank a note after delivery and while in the hands of payee. Parol evidence showed that he intended to assume the liability of guarantor. *Held*, such act authorizes the payee to write over the signature the contract of guaranty in full, and this constitutes a sufficient memorandum in writing to satisfy the Statute of Frauds. *Peterson v. Russell*, 64 N. W. Rep. 555 (Minn.).

This is the first time the point in question has come up for decision in Minnesota. The authorities are divided. In accord, see *Kealing v. Vansickle*, 74 Ind. 529; *Beckwith v. Angell*, 6 Conn. 315; *Stowell v. Raymond*, 83 Ill. 120. *Chaddock v. Vanness*, 35 N. J. Law, 517, cited by the court as authority, is not in point. The New Jersey decisions are *contra* to the principal case. See *Hayden v. Weldon*, 42 N. J. Law, 128. For further authorities holding that a blank indorsement of a note in the hands of the payee does not satisfy the Statute of Frauds, and that payee has no authority to fill in the contract of guaranty, see *Temple v. Baker*, 125 Pa. St. 634; *Culbertson v. Smith*, 52 Md. 628. For the three doctrines applied where the anomalous indorsement is made before delivery to payee, see 7 HARVARD LAW REVIEW, 373.

**CARRIERS — SLEEPING CARS — RIGHT TO TRANSFER USE OF SECTION FOR PART OF JOURNEY.** — *Held*, that a purchaser of a sleeping car section, who leaves the train before reaching his destination, may transfer the use of the section to another passenger for the rest of the journey. *Curlander v. Pullman Palace Car Co.* (Baltimore Superior Court). See NOTES.

**CARRIERS — WRONG TICKET — EJECTION FROM TRAIN.** — *Held*, that where a passenger requests and pays for a ticket to A. and by a mistake of the ticket agent is given a ticket to B. only, with which he enters the train without noticing the error, he has a right to ride to A. on making proper explanations to the conductor; and can recover from the company for ejection by the conductor at B. *Evansville & T. H. R. R. Co. v. Cates*, 41 N. E. Rep. 712 (Ind.). See NOTES.

**CHOSE IN ACTION — ASSIGNMENT — NOTICE TO DEBTOR — PRIORITY.** — *Held*, a prior assignee of a chose in action will be protected, though he has given no notice of the assignment either to the subsequent assignee or the obligor. *Fortunato v. Patten*, 41 N. E. Rep. 572 (N. Y.).



This doctrine is well settled in New York. *Fairbanks v. Sargent*, 104 N. Y. 108, and is in accord with the weight of American authority. *Putnam v. Story*, 132 Mass. 205; *Kennedy v. Parke*, 17 N. J. Eq. 415; *Meier v. Hess*, 32 Pac. Rep. 755 (Ore.). The English doctrine is that the first assignee giving notice is protected, following the rule in *Dearle v. Hall*, 3 Russ. 1. The Federal courts and a few of the State courts have adopted this rule. *Methuen v. Staten Island Light Co.*, 66 Fed. Rep. 113; *Van Buskirk v. Hartford Fire Ins. Co.*, 14 Conn. 140; *Murdock v. Finney*, 21 Mo. 139.

**CONFLICT OF LAWS — FOREIGN CONTRACTS — PUBLIC POLICY.** — Goods were shipped on an English vessel from Germany to Philadelphia; the contract, made in Germany, exempted the ship owner from liability for the negligence of master or crew, and provided that disputes should be settled according to the law of the ship's flag. The plaintiff's goods were damaged at Philadelphia through the negligence of the crew. *Held*, although such contracts are valid in Germany and in England, they are considered against public policy here, and will not be enforced. *The Glenmavis*, 69 Fed. Rep. 472.

If this contract had been made in America, most of our courts would have held it unenforceable. 2 Parsons on Contracts, 8th ed., 259. Nor will the courts of one nation respect the laws of another when such a course is against public policy. Westlake, Private Internat. Law, § 215. It may be doubted, however, whether a contract like this, made abroad, offends against American interests; public policy may demand that we preserve a high standard of care in our community by forbidding our people to sell their vigilance, but if such an act is done in a German community it is a question of German, not of American policy, and there would seem to be no reason for refusing to give effect to the foreign law. *Forepaugh v. Delaware, &c. R. R. Co.*, 128 Pa. St. 217. The doctrine of the principal case appears, however, to have been adopted by the Federal courts. *Lewisohn v. National Steamship Co.*, 56 Fed. Rep. 602. See Hutchinson on Carriers, §§ 140-144 a.

**CONSTITUTIONAL LAW — CRIMINAL PROCEDURE — WAIVER OF TWELVE JURORS.** — The defendant by his consent was tried for a felony by a jury of eleven men, and upon conviction he moved for a reversal of judgment. *Held*, that in a case of felony the defendant could not waive his constitutional right to a trial by a full jury of twelve men. *Territory v. Ortiz*, 42 Pac. Rep. 87 (N. Mex.). See NOTES.

**CONSTITUTIONAL LAW — SELF-INCRIMINATING TESTIMONY — STATUTORY PROTECTION AGAINST PROSECUTION.** — *Held*, (1) that the Fifth Amendment to the United States Constitution does not protect a witness from giving testimony which merely tends to reflect upon his character; (2) that an act of Congress, providing that no person shall be excused from testifying in proceedings under the Interstate Commerce Act on the ground that it may tend to criminate him, but that no person shall be prosecuted or subjected to any penalty on account of anything concerning which he may testify, is constitutional, since it affords a protection as broad as the constitutional provision. *Brown v. Walker*, 70 Fed. Rep. 46.

The first point is well settled. *U. S. v. Smith*, 4 Day's R. 121; 1 Greenleaf on Evidence, § 454, and cases cited. The second point overrules the decision in *U. S. v. James*, 60 Fed. Rep. 257, thus bringing the Federal rule into line with the majority of State decisions upon the same point. *People v. Kelly*, 24 N. Y. 74; *People v. Sharp*, 107 N. Y. 427; *Wilkins v. Malone*, 14 Ind. 153; *State v. Quarles*, 13 Ark. 307; *Higdon v. Heard*, 14 Ga. 255. See, *contra*, *Cullen v. Com.*, 24 Grat. 624; *Counselman v. Hitchcock*, 142 U. S. 597. Compare *Emery's Case*, 107 Mass. 172.

**CONSTITUTIONAL LAW — TRIAL BY JURY.** — The Constitution of Kansas provides that "the right of trial by jury shall be inviolate." The petitioner was summarily convicted under a city ordinance, forbidding that which the State laws made a penal offence generally, and applies for his discharge on *habeas corpus* under the above provision. *Held*, that since an appeal lay from the city court to a court in which a trial by jury was secured, the summary proceeding was not in conflict with the Constitution, if the appeal was "clogged by no unreasonable restrictions"; that since in this case the appeal was conditioned "for the payment of such fine and costs as shall be imposed on him, if the case shall be determined against the appellant," it was unreasonably restricted. *Re Jahn*, 41 Pac. Rep. 956 (Kan.).

In regard to the first point, there is a conflict of authority. A previous Kansas case, *Emporia v. Volmer*, 12 Kan. 622, and cases in several other States, support this decision. The authorities are collected in 1 Dill. Mun. Corp. (4th ed.) § 439, and in Cooley, Const. Limit. (5th ed.) 506, 507. See especially *Beers v. Beers*, 4 Conn. 535, and *Jones v. Robbins*, 8 Gray, 329. In *Callan v. Wilson*, 127 U. S. 540, the opposite

conclusion is reached in a case concerning the common law offence of conspiracy, and for the present purpose there seems no distinction between a common law and a statutory offence. The doctrine of the Supreme Court is consonant with the established regard for the rights of the citizen, but the decision of the principal case has practical grounds of convenience and despatch. On the second point, the decision seems correct. *Cooley*, Const. Limit. (5th ed.) 507, and cases cited. See NOTES.

CONTRACTS — DEFENCE — FRAUD. — Plaintiff sued on a written instrument, purporting to be a contract between plaintiff and defendant. Defendant pleaded that an oral contract had been entered into between plaintiff and defendant, under which plaintiff agreed to purchase a safe; that plaintiff fraudulently represented to defendant that the document sued on embodied the terms of the oral contract, whereas in fact the alleged promise of defendant in the written instrument substantially differed from defendant's promise in the oral agreement; that defendant, relying on plaintiff's representation, signed the instrument sued on. The lower court struck out this plea on the ground that it varied a written contract by oral evidence. *Held*, that this was error. *Wood v. Cincinnati Safe Co.*, 22 S. E. Rep. 909 (Ga.).

Clearly a correct decision; the object of the plea was not to vary the written agreement, but to show that it conferred no enforceable rights on plaintiff. This case suggests the inquiry whether the facts disclosed constitute an affirmative personal defence or a negative defence to be pleaded under non-assumpsit. Under certain circumstances the answer to this inquiry determines the question of a defendant's liability. In *Foster v. Mackinnon*, L. R. 4 C. P. 704, the defendant, who was sued as an indorser of a promissory note, had written his name on the back of the instrument, relying on a fraudulent representation that he was signing a guaranty; an instruction that defendant, if not guilty of negligence, was not liable to plaintiff, an innocent purchaser for value, was held correct. It would therefore seem that in the principal case the defence was properly non-assumpsit. Pollock on Contracts, 5th ed., 441-466.

CORPORATIONS — LIMITATION OF THE INDEBTEDNESS OF A CITY. — A State constitution provided that no city "shall become indebted in any manner" over a certain amount. *Held*, this does not prohibit a city already indebted to said amount from borrowing money to finish waterworks, if the loan is to be paid out of a special fund created by the receipts derived from such waterworks, as this imposed no further liability on the general funds of the city. *Winston v. City of Spokane*, 41 Pac. Rep. 888 (Wash.).

Two judges out of the five who sat on the case dissent, and the question is undoubtedly a close one. Those who loaned the money must go at the special fund, and cannot claim payment out of the general city funds even in quasi-contract, it seems. The city would be liable for failure to create the special fund, and damages could be claimed from the city's general funds. But the majority of the court thought such liability too remote.

CORPORATIONS — POWER TO TAKE FORBIDDEN PROPERTY BY DEVISE. — Bill by widow and heirs to construe a will. The will directed a trustee to sell certain warehouse property and pay the proceeds to the defendant corporation. The proceeds of the sale were in the trustee's hands. The corporation's charter forbade it to take and hold property over a certain amount, and plaintiffs contended that this limit was already reached. *Held*, this question can be raised only by the State. *Hanson v. Little Sisters of the Poor*, 32 Atl. Rep. 1052 (Md.). See NOTES.

CRIMINAL JURISDICTION — BRINGING STOLEN GOODS INTO STATE. — *Held*, that the common law rule, that, where one steals goods in one country and brings them into another, the latter has no jurisdiction of the offence, applies to the different States of the Union. *Strouther v. Commonwealth*, 22 S. E. Rep. 852 (Va.).

The case is right. Several States, it is true, allow conviction in similar cases, on the ground that the States are in the same relative position as the English counties. *State v. Ellis*, 3 Conn. 185; *State v. Hamilton*, 11 Ohio, 435; *Comm. v. Holder*, 9 Gray, 7. But the anomaly, which made each new act of removal across a county line accompanied with the felonious intent, a complete new crime, and yet allowed one conviction to bar an indictment anywhere else, was not extended to thefts in Scotland, or to the Channel Islands. *Reg. v. Anderson*, 2 East P. C. 772; *Rex v. Prowes*, 1 Mood. C. C. 349. On the actual facts the doctrine cannot stand, for the thief certainly gets possession by the original act; and it is submitted that though this objection may be waived in a set of counties where only one Legislature exists, and only one conviction can be had, it is an insuperable obstacle to any application of the rule to this country. The criminal laws of the States differ in important respects, are not derived from the



same source, and are entirely free from control by the central government. In accord with the principal case are *State v. Le Blanch*, 2 Vroom, 82; *State v. Beall*, 15 Ind. 378; and see the dissenting opinion of Thomas, J., in *Comm. v. Holder*, *supra*.

**CRIMINAL LAW — MURDER AND MANSLAUGHTER.** — Defendant was indicted for the murder of a person who attempted to arrest him without a warrant. The court charged that such unwarranted arrest was in general sufficient provocation to reduce the crime to manslaughter, "unless such killing was done in such a way as to show brutality, barbarity, and a wicked and malignant purpose." On conviction this writ of error was brought. *Held*, that the question of manslaughter or murder does not depend on the way in which the killing was done, and that the charge was erroneous. *Brown v. United States*, 16 Sup. Ct. Rep. 29.

This is a sound decision. The question of fact for the jury is whether a certain state of mind existed in the defendant at the time of killing. This they must do from evidential facts, but it is not for the judge to charge that any particular facts are conclusive. See *Terre Haute, &c. Railroad Co. v. Voelker*, 129 Ill. 540.

**DAMAGES — EMINENT DOMAIN.** — Where a city opens a street across the right of way of a railroad, the verdict of a jury giving nominal damages only is sustained. *Chicago, &c. Railroad Co. v. Cicero*, 41 N. E. Rep. 640 (Ill.).

There was evidence in the case of a depreciation in value of that part of the right of way occupied by tracks, and the market value of the part not so occupied was also shown. But the court says that the usual rule of compensation to individuals does not apply to this case, and refuses to allow any recovery. The cases cited would seem to show that this is the established doctrine in Illinois. It does not seem satisfactory, however, the better rule being that laid down in *B. & A. Railroad v. Cambridge*, 159 Mass. 283: "The ruling that the petitioner was entitled to recover for the fair value of its land taken, subject to its use for railroad purposes, was correct."

**EQUITY — INJUNCTION — RELIGIOUS CORPORATIONS.** — Where a church has been incorporated under a State statute as a member of a particular denomination, and acquired property as such, it cannot, without the unanimous consent of its members, transfer its property to another branch of the denomination which holds different doctrines. *Park et al. v. Champlin et al.*, 64 N. W. Rep. 674 (Ia.).

Where property to which no specific trust is attached has been acquired by a church which professes a particular faith, there is some diversity of opinion as to the rights of a majority of its members in case they wish to change their allegiance. The New York courts, interpreting their statute, do not recognize any denominational character in religious corporations, and the rights of a majority therein are the same as in any lay corporation. 2 R. S. of 1813, § 3; *Robertson v. Bullions*, 11 N. Y. 243; *Watkins v. Wilcox*, 66 N. Y. 654. Michigan has followed New York in this respect. *Wilson v. Livingstone*, 99 Mich. 594. As a general rule, however, in the case of churches which acknowledge themselves members of a larger communion which exercises a more or less efficient supervision over their belief, the minority which is in accord with the tenets of the governing body will be given the property as against a seceding majority. See *Smith v. Pedigo*, 33 N. E. Rep. 777 (Ind.); *Church v. Whitmore*, 83 Ia. 147; *Roshi's Appeal*, 69 Pa. St. 462; *Baker v. Ducker*, 79 Cal. 365.

**ESTOPPEL — MISREPRESENTATION OF BOUNDARY BY VENDOR.** — Plaintiff bought a lot of land adjoining defendant's lot. In erecting a building thereon he built up to a line, pointed out by defendant as the boundary, but which in fact was several feet within defendant's lot. This action is brought in equity to enjoin defendant's interference with his possession. *Held*, that though defendant was in "honest error," he is estopped to deny the boundary indicated by himself. *Ross et al. v. Penn et al.*, 64 N. W. Rep. 283 (Ia.).

This case indicates the present tendency of the doctrine of estoppel. According to the overwhelming weight of earlier authority, no representation estopped its maker unless it was made with knowledge of its falsity, or at least when he was "bound to know the true state of things." Bigelow on Estoppel, 5th ed., chap. xviii. sec. 3. In this light, on much the same facts as found in the present case, an opposite conclusion was reached in *Liverpool Wharf v. Prescott*, 7 Allen, 494. Authorities are being found more plentifully every year in support of the position that wilful falsehood or reckless ignorance is not necessary to create an estoppel; that it is enough if a representation has been made in pure error, on which the other party has been induced to act. Bispham's Principles of Equity, 5th ed., §§ 283, 288, and cases cited.

**EVIDENCE — CHARACTER — FALSE IMPRISONMENT.** — *Held*, evidence to establish the previous good character of plaintiff in a suit for false imprisonment is inadmis-



sible, where no attempt has been made to assail it. *Diers v. Mallon*, 64 N. W. Rep. 722 (Neb.).

It seems fairly well settled that the defendant, for the purpose of showing probable cause, may introduce evidence of the general bad character of the plaintiff. *Isreal v. Brooks*, 23 Ill. 575; *Bacon v. Towne*, 4 Cush. 240; *Martin v. Hardesty*, 27 Ala. 458. But there is some authority *contra*; *Ryburn v. Moore*, 77 Tex. 85; Greenleaf on Evidence, Vol. I. sec. 54, Vol. II. sec. 458. Presumably, where defendant is allowed to put in evidence of the general bad character of the plaintiff, the latter would be allowed to rebut it by evidence of general good character, though there seem to be no direct decisions on this point. In accord with the principal case are *Cochran v. Toher*, 14 Minn. 385; *Association v. Fleming*, 3 S. E. Rep. 420 (Ga.). Directly *contra* is the recent case of *Funk v. Amor*, 7 Ohio C. C. 419, holding that the plaintiff may introduce evidence of his own good character in the first instance. The authorities on the question are very meagre.

**LIFE INSURANCE — SUICIDE — INSANITY.** — This was an action to recover on an insurance policy. The defence was suicide, and the reply insanity at the time of death. The court charged that suicide was in general a ground of forfeiture in such a case as a breach of an implied condition, and that if the man understood the wrongfulness of his acts the amount could not be recovered. The only question for the jury was "whether his mind was so impaired that he could not properly comprehend the character of the act he was about to commit." *Ritter v. Mutual Life Ins. Co. of New York*, 69 Fed. Rep. 505.

There is on this general question an irreconcilable conflict of opinion, but on the facts the above charge is erroneous. There was conclusive evidence to show that the deceased knew "the consequences of his deed to himself and others," and under these circumstances the decided preponderance of authority and the strongest arguments support the view that the company is not liable, though the insured was at the time under an insane delusion which rendered him morally and legally irresponsible. *Dean v. Amer. Mut. L. Ins. Co.*, 4 Allen, 96; *St. Louis Mut. L. Ins. Co. v. Graves*, 6 Bush, 268; *Van Zandt v. Mut. Ben. L. Ins. Co.*, 3 Ins. Law Journal, 208; *Borradale v. Hunter*, 5 M. & G. 639. And see Bliss on the Law of Life Insurance, 2d ed., §§ 228-243.

**PERSONS — DIVORCE — EXTREME CRUELTY — MENTAL SUFFERING.** — The plaintiff petitioned for a divorce from her husband for extreme cruelty. The cruelty alleged was his commission of sodomy with a beast. *Held*, that such conduct was extreme cruelty, as tending to cause mental suffering that would affect the health, and exciting apprehension of the communication of disease. Divorce granted. *Anonymous*, 2 Ohio Nisi Pr. 342.

In the absence of statutory definition, it is generally settled that cruelty sufficient to justify divorce consists of conduct that injures, or may reasonably be apprehended to injure, the physical health of the complainant. *Kelly v. Kelly*, L. R. 2 Prob. & Div. 31; *Sylvio v. Sylvio*, 11 Col. 319; 1 Bish. Marr., Div. & Separ. § 1563. In some States mere mental suffering not injurious to mental or bodily health is considered sufficient. *Palmer v. Palmer*, 45 Mich. 150. But such doctrine is strongly denied elsewhere. *Bailey v. Bailey*, 97 Mass. 373. When mental suffering is so great that it may reasonably be apprehended to produce physical ill-health, divorce ought to be granted, and it is the decision of this difficult question of fact that gives courts an opportunity to relax the spirit of the rule while following its letter. The present case, is perhaps an instance of such relaxation, and is not undesirable. But somewhat *contra*, see *W— v. W—*, 141 Mass. 495. Compare *Russell v. Russell*, 11 *The Times Law Rep.* 579, noticed in 9 HARVARD LAW REVIEW, 222.

**PRACTICE — JOINT JUDGMENT — FAILURE TO SERVE ON PARTY — ENFORCEMENT.** — *Held*, a judgment of a court of one State, rendered against three defendants jointly in an action in which one of them was not served with process, cannot be enforced in another State by an action of debt thereon against one of the defendants who in the original action was served with process. The plaintiff who sues on a judgment must recover against all the defendants or none; for, the judgment being an entirety, whatever constitutes a good defence for one of the defendants operates also for the benefit of the others. *Watson v. Steinan*, 33 Atl. Rep. 4 (R. I.).

A glance at the authorities cited shows that the point is well settled; in fact, no case has been found which disputes the position taken. Judgments in actions upon joint contracts are distinguished, under a local statute. *Nathanson v. Spitz*, 31 Atl. Rep. 690 (R. I.). Of the authorities cited in the principal case, see especially *Burt v. Stevens*, 22 N. H. 229; *Donnelly v. Graham*, 77 Pa. St. 274; *St. Louis v. Gleason*, 15 Mo. App. 25. *Oakley v. Aspinwall*, 4 N. Y. 514, contains an elaborate discussion of

the matter, though, as remarked in a note by the learned reporter, the exact point was not decided. As to "Joint Debts Acts," see the opinion of Mr. Justice Bradley, in *Hall v. Lanning*, 91 U. S. 168, cited in *Nathanson v. Spitz*, *supra*.

PROPERTY — ADVERSE POSSESSION BY TENANT IN COMMON. — Land was devised for life with remainders over, and plaintiff and defendant were remaindermen, and entitled to claim as tenants in common. *Held*, this did not preclude the defendant's acquiring the whole land by adverse possession, she having inherited the land from her father, who claimed under a deed from the life tenant purporting to convey a fee, and having held adversely to plaintiff for the statutory period. *Moie v. Folk et al.*, 22 S. E. Rep. 882 (S. C.).

A co-tenant may oust his fellow by adverse claim, though it is hard to show a distinct intention to do so. In the principal case such an intention appeared. Defendant inherited a fee, as she thought, absolutely from her father, and had probably never heard she was entitled under any instrument but that under which her father held. She claimed adversely to plaintiff and also to herself, so to speak. There is no question here, as in *Board v. Board*, L. R. 9 Q. B. 48, of estoppel from claiming adversely, as defendant never claimed in remainder under the instrument giving her that right.

PROPERTY — APPLICATION OF MAXIM "PENDENTE LITE NIHIL INNOVETUR." — Plaintiff brought a bill to recover land on the ground of fraud, and set out the facts on which he relied to show fraud. Later, an amendment was allowed setting out additional facts to show fraud. On these additional facts plaintiff obtained a decree. Between the time of filing the bill and its amendments, defendant conveyed to a third party who had notice of the facts relied on under the original bill, and, being satisfied that those facts were insufficient to show fraud, had purchased the estate. *Held*, as the amendment did not change the subject matter of the suit, but merely specified additional matters of proof on the same ground of recovery, i. e. fraud, the suit was the same throughout, and the doctrine of *lis pendens* applies. *Turner v. Hought*, 33 Atl. Rep. 28 (N. J.).

The court begins by remarking that the maxim of *lis pendens* is not based on implied notice to all the world of the facts which constitute the grounds of the suitor's claim, but is only notice of the existence of a suit in regard to the matter in dispute, and that where the suit is in regard to property, people purchasing the property do so at their peril as to the result of the suit. *Pomeroy*, 2 Eq. Jur. §§ 632 *a*, 633, and cases cited. It follows from this, that the purchaser's notice of the facts to establish fraud in the bill as originally filed in the case at bar, and his reliance on them, are immaterial as regards the doctrine of *lis pendens*, and that the vendee brought *pendente lite*, as the insertion of further allegations of the same character as those put in the original bill did not alter the identity of the suit as to the parties, subject matter, or purpose, and consequently that the suit under which plaintiff won was the same as that pending at the time of the purchase of the land. *Gibbon v. Dougherty*, 10 Ohio St. 365.

PROPERTY — EASEMENT — PRESCRIPTION. — Light had come to the plaintiff's windows over the defendant's premises for a period of nineteen years and nine months. The defendant then started to erect a building that would interfere with the light. The Prescription Act made no interruption of user effective which existed less than one year. *Held*, that the plaintiff had no easement of light at the time of filing the bill, and therefore the court would not enjoin the defendant from building. *Battersea v. Commissioners*, [1895] 2 Ch. 708.

Sect. 3 of the Prescription Act, 2 & 3 Wm. IV. c. 71, provides that the right to light shall become absolute after twenty years' enjoyment without interruption, and sect. 4 provides that interruption must be at least one year in duration. This has been construed to make the defendant powerless after the end of the nineteenth year to prevent the acquisition of an easement over his property at the end of the twenty years. *Flight v. Thomas*, 8 Cl. & F. 231. This might make a very hard case on the defendant, who, during the twentieth year, should erect valuable buildings in ignorance of the plaintiff's claim, only to be compelled to remove them at the end of the year. It would not seem a matter to be regretted that prescription acts in this country do not contain a provision similar to sect. 4 of the English act.

PROPERTY — EXCEPTION AND RESERVATION — PROFIT À PRENDRE. — A person conveyed his mill-site, situated on a dam, "excepting and reserving the right of running logs through the premises from the river, and of erecting and maintaining a log-slucice from the mill-pond, about five feet in width." There was no sluice-way existing at the time of the grant. *Held*, the grantor thus obtained rights, either as an exception of a part of the thing granted, or a *profit à prendre*, which he could convey independently of



his remaining property. The absence of the word "heirs" does not limit the right to the life of the grantor. *Ring v. Walker*, 33 Atl. Rep. 174 (Me.).

Courts in order to carry into effect the intention of the parties, have before this adopted the conception that land contains within itself certain undeveloped rights, as rights of way, etc., capable of exception in this unperfected shape, and capable of subsequently springing into full existence. *Winthrop v. Fairbanks*, 41 Me. 307; *Karmuller v. Krotz*, 18 Iowa, 359; *Bowen v. Connor*, 6 Cush. 132. The difficulty with the case seems to be in calling the right excepted a *profit à prendre*, and so capable of inheritance and assignment, as distinguished from an easement in gross. The language of the deed seems decisive against considering it as an exception of the land itself on which the sluice-way was to be built.

PROPERTY — PERCOLATING WATER — RIGHT OF DIVERSION — MOTIVE. — Water passed by percolation from the defendant's land to that of plaintiff, and supplied a large spring on the plaintiff's land. The defendant, with the intention of injuring the plaintiff, and so to induce him to buy out his land, or make him some other compensation, commenced operations, the effect of which would be to divert the percolating water away from the plaintiff's spring. *Held*, affirming [1895] 1 Ch. 145, defendant has an absolute right to appropriate or divert the water percolating through his soil, irrespective of his motive in so doing. *The Mayor, &c. of Bradford v. Pickles*, [1895] App. Cas. 587.

When this point has come up for direct decision in this country, in regard to the use of property, it seems generally to have been decided, in accordance with the doctrines of the principal case, that the malice or negligence of the defendant is immaterial. *Chatfield v. Wilson*, 28 Vt. 49; *Elster v. Springfield*, 30 N. E. Rep. 274; *Phelps v. Nowlen*, 72 N. Y. 39; *Mahan v. Brown*, 13 Wend. 261. But see, *contra*, *Chesley v. King*, 74 Me. 164; *Greenleaf v. Francis*, 18 Pick. 117; *Wheatley v. Baugh*, 25 Pa. St. 528; *Haldeman v. Bruckhart*, 45 Pa. St. 514; *Bassett v. Company*, 43 N. H. 569; *Sweet v. Cutts*, 50 N. H. 439; *Roath v. Driscoll*, 20 Conn. 533; *Panton v. Holland*, 17 Johns. 92; *Bartlett v. O'Connor*, 36 Pac. Rep. 513. See also *Angell on Watercourses* (6th ed.) 114-114 o. It would seem that whether one's right to appropriate percolating water is absolute or merely relative is a question, the determination of which, as in the case of malicious interference with business, depends largely on policy.

PROPERTY — PRESCRIPTIVE RIGHT TO REPAIRS. — Payment by owners of land for more than twenty years of an annual sum, toward repairs on a dam situated on a stranger's premises, subjects the land to a servitude to pay that sum annually. *Whitten-ton Mfg. Co. v. Staples*, 41 N. E. Rep. 441 (Mass.). See NOTES.

SALES — CONDITION RESTRICTING OBJECTION TO TITLE — SPECIFIC PERFORMANCE REFUSED. — The defendant, at auction, bought of the plaintiff a leasehold interest in certain land, paying £30 deposit. One condition of the sale was that the purchaser should "not make any requisition or objection" in respect to a certain intermediate title, but should assume a good title in the assignees, under whom vendor claimed, for the residue of the term. The defendant on examination found plaintiff's title worthless, and refused to go on. This is an appeal from an action for specific performance brought by the vendor. *Held*, that since plaintiff could not convey any title it would be manifestly unjust to decree specific performance, though the contract may be good enough in law. Nor will the deposit be recovered, as there is no personal equity entitling the defendant to such a decree. The parties must abide by their legal remedies. *Scott v. Alvarez*, [1895] 2 Ch. 603.

This decision, though without an exact precedent, seems sound. The purchaser entered into this contract fully warned of the condition of the vendor's title, and no equity has arisen to entitle either to a decree. The court is sound in allowing an inquiry into the intermediate title when specific performance is demanded. *Jones v. Clifford*, 3 Ch. D. 779. The deposit would not be recoverable at law, as there has been no fraud nor breach of contract on the part of the vendor. *Corrall v. Cattell*, 4 M. & W. 734. It seems probable, indeed, that the vendor could recover damages from the vendee for his breach, though the amount would be inconsiderable.

STATUTE OF LIMITATIONS — NEGLIGENCE OF PUBLIC OFFICER — WHEN ACTION ACCRUES. — A register of deeds recorded a mortgage from A. to B., but failed to index it, and in a few months went out of office. After more than six years, which was the period of limitation, C. advanced money on the same land, supposing from the index that it was unencumbered. The land was sold to pay the prior mortgage, A. became bankrupt, and C. sued the register. *Held*, the breach of duty was a complete cause of action, and, as the register could not commit a breach after the end of his term, the



tatute begun to run at the end of that term, at least. *State ex rel. Daniel v. Grizzard*, 23 S. E. Rep. 93 (N. C.).

The theory of the case is that a negligent breach of official duty is in itself an invasion of the rights of all members of the class likely to be affected by it. Such a doctrine is fantastic on its face, and entirely at variance with the principle that actual damage is an essential part of an action for negligence. *Bank, &c. v. Waterman*, 26 Conn. 324; *Roberts v. Read*, 16 East, 215; and a strong dissenting opinion in *Bells v. Norris*, 21 Me. 314. And if the right to sue is complete at once, why should not the statute attach immediately, rather than at the end of the term? In accord with the principal case is a late decision by the same court in *Shackelford v. Staton*, 23 S. E. Rep. 101.

**TORTS — LOCALITY OF OFFENCE.** — A laborer working in the hold of a vessel, which was being loaded with lumber, was struck and injured by a plank, sent without warning down a chute by a person on the pier. *Held*, the jurisdiction of the tort is determined by the locality of the damage, not by that of the cause of damage. *Herman v. Port Blakely Mill Co.*, 69 Fed. Rep. 646.

The case cannot be distinguished from that of a man on one ship struck by a bullet from a gun on another; *U. S. v. Davis*, 2 Sumner, 482; or on the shore; *Coombe's Case*, 1 Leach, 432. The determining point is the last physical act which affected the person struck. In the cases cited the act was intentional, but the principle applies equally to an act of negligence. The damage to the plaintiff, the substantial part of the cause of action, is the same, and this accrues at the moment of actual contact of the destructive agent. Abundant authority supports the principal case. *The Plymouth*, 3 Wall. 20; *Leonard v. Decker*, 22 Fed. Rep. 741; *The Maud Webster*, 8 Ben. 547.

**TORTS — MALICIOUS INTERFERENCE WITH BUSINESS — CONSPIRACY.** — The local officers of a branch of the National Association of Master Plumbers notified the wholesale dealers in plumbing materials in the State not to sell to the complainants, who were not members of the association, under the penalty, in case of their continuing to do so, of losing the trade of the members of the association. This notification was in pursuance of resolutions adopted at a convention of the association. *Held*, no conspiracy, for what was done was lawful and done in a lawful manner. The desire to free themselves from the competition of the complainants was a sufficient excuse to prevent the act from being the violation of a legal right. *Macaulay v. Tierney*, 33 Atl. Rep. 1 (R. I.).

Interesting as the latest decision on a much vexed question. See NOTES, 8 HARVARD LAW REVIEW, 510. The court cites with approval the English case of *Mogul Steamship Co. v. McGregor*, in which the question was practically the same. The question is one of policy rather than theory. See Mr. Justice Holmes's article, 8 HARVARD LAW REVIEW, 1.

**TORTS — UNFAIR COMPETITION — FRAUDULENT SIMULATION.** — Plaintiff had built up a large trade for his store, known as the "Mechanic's Store." Defendant, a competing trader, moved his establishment to a building adjoining plaintiff's, and labelled his store the "Mechanical Store." Plaintiff on his lot put up a building of very distinctive appearance, in which he continued his business. Defendant on his adjoining lot erected a building exactly similar to plaintiff's, as regards the appearance of the lower stories. In using the name "Mechanical Store," and in erecting his building, defendant intended to and did induce the public to buy of him, thinking they were trading with plaintiff. *Held*, defendant would be enjoined from using the name "Mechanical Store," and would be required to distinguish his store from plaintiff's. *Weinstock v. Marks*, 42 Pac. Rep. 142 (Cal.).

The result reached in the principal case, an eminently satisfactory one from all standpoints, is fully sustained by the authorities cited in the well reasoned opinion by Garoutte, J.: "Manufacturers . . . have no right to beguile the public into buying their wares under the impression they are buying those of their rivals." Brown, J., in *Coats v. Merrill Thread Co.*, 149 U. S. 562, at 566. In *Pierce v. Guizard*, 66 Cal. 68, 8 Pac. Rep. 645, a defendant was enjoined from using an imitative label. *Schmidt v. Brieg*, 100 Cal. 672, 35 Pac. Rep. 623, *semble*. As pointed out in the opinion, defendant's liability must be the same whether he has pirated plaintiff's trade by the use of an imitative label or an imitative store front. 9 HARVARD LAW REVIEW, 291.

**TRUSTS — NOTICE TO BENEFICIARY.** — Where a bank depositor changes a deposit in his own name to one in trust for his brother, but retains the bank-book until after his brother's death, and testifies that he never intended his brother to have the deposit, *held*, no trust arises in favor of his brother's administrator. *Cunningham v. Davenport*, 41 N. E. Rep. 412 (N. Y.).

This case does not impugn the previous New York decisions to the effect that, when

a depositor opens an account in trust for a third party without notifying the beneficiary and dies having the book in his possession, and leaving the account unexplained, a trust arises in favor of the third party. Where no real trust is intended, and the depositor simply uses another's name for purposes of his own, his intent may always be shown, and will be controlling. See Ames's Cases on Trusts, Ch. I. § 13.

WILLS — DESTRUCTION OF SUBSEQUENT INSTRUMENT. — A statute declared that "no will nor any part thereof shall be revoked except . . . by some other will or codicil in writing" duly executed. Testator destroyed a second will, which did not contain an express clause revoking his first. *Held*, first will was valid. *Cheever v. North*, 64 N. W. Rep. 455 (Mich.).

The court says the statute merely declared the common law rule, and that the former will was not revoked by the subsequent one by that rule. It also says the destruction of the second instrument revives the first will. Revival is making good something hitherto void. But the court had declared that the first will never was void. So the doctrine of revival is hardly applicable, but the decision that the first will had never been revoked was sufficient to dispose of the case. At common law a subsequent will did not revoke a previous one, *Hutchins v. Bassett*, 2 Salk. 592, even if the subsequent one contained the words, "this is my last will." *Lemage v. Goodfan*, L. R. 1 P. & D. 57. The case of *Peck's Appeal*, 50 Conn. 562, is in accord with the principal case under a similar statute, and cites various authorities.

WILLS — ISSUE LIVING — CHILD EN VENTRE SA MÈRE. — *Held*, that a child *en ventre sa mère* is to be deemed living not only for his own benefit, but also for that of others. *In re Burrows*, [1895] 2 Ch. 497. See NOTES.

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## REVIEWS.

THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I. By Sir Frederick Pollock, Bart., M.A., LL.D., Corpus Professor of Jurisprudence in the University of Oxford, and Frederic William Maitland, LL.D., Downing Professor of the Laws of England in the University of Cambridge. Cambridge: At the University Press, 1895. 2 vols. 8vo, pp. xxxviii, 678, and xiii, 684.

Here, truly, one finds "the gladsome light of jurisprudence"! It is good to have lived to see the day when such a book can be printed, a book in which technical learning is presented accurately and exactly, and yet in a manner so engaging. The literary gift which has shaped these volumes is remarkable; but the combination of this quality with a strong intellectual grasp and easy mastery of all the recondite learning which finds expression here is far more remarkable. This is not only a learned and valuable book, but a delightful one.

The space allowable in these columns does not permit any review of the work at all worthy of its merits. Let us, however, make sure that the scope of the work is understood.

In a short Introduction the authors point out that they are not undertaking any philosophical discussion of the nature of law. Law they conceive of as "the sum of the rules administered by courts of justice." They declare that the law prevailing in England before the Norman invasion "was, in the main, pure Germanic law," not Celtic or Roman. Of that period of the early law they are to speak very briefly. They are to stop at the reign of Edward I., because the period since that date is intimately linked in with our modern law; "the law of the later middle ages . . . has never passed utterly outside the cognizance of our courts and our practising lawyers." Constitutional history and law, and ecclesiastical matters they are to leave one side. "We have thought less," they say "of symmetry than of the advancement of knowledge. The time for



an artistically balanced picture of English mediæval law will come; it has not come yet."

As regards this limitation to the period of Edward I., we may accept the reasons for ending the present book at that point without excusing our authors from carrying on the work thus admirably begun. They must not stop here forever.

The body of the History is in two Books, the first of which, in six chapters and about two hundred pages, gives "a sketch of early English history, "including brief accounts of Anglo-Saxon and Norman law, of England under the Norman Kings, of Roman and Canon law, of the age of Glanvill and the age of Bracton. And then, at the end of this Book, the authors intimate what is to come by saying that "now having brought down our general sketch of the growth of English law to the accession of Edward I., 'the English Justinian,' we may turn to an examination of its rules and doctrines as we find them in the age of Glanvill and the age of Bracton."

The second Book, which begins at page 207 of the first volume, then comes back and takes up the body of English law for more particular scrutiny. The scheme of this part of the work, under the general title of "The Doctrines of English Law in the Early Middle Ages," will be best stated in the authors' words: "As regards the law of the feudal time we can hardly do wrong in turning to the law of land tenure as being its most elementary part. We shall begin therefore by speaking of land tenure, but in the first instance we shall have regard to what we may call its public side; its private side we may for a while postpone, though we must not forget that this distinction between the two sides of property law is one that we make for our own convenience, not one that is imposed upon us by our authorities. From land tenure we shall pass to consider the law of personal condition. The transition will be an easy one, for the broadest distinction between classes of men that will come before us, the distinction between free men and men who are not free, is intricately connected with land tenure, in so much that the same word *villenagium* is currently used to denote both a personal status and a mode of tenure. Then we shall turn to the law of jurisdiction, for this again we shall find to be intertwined with the land law; and along with the law of jurisdiction we must examine the 'communities of the land.' Having dealt with these topics, we shall, it is hoped, have said enough of political structure and public affairs, for those matters which are adequately discussed by historians of our constitution we shall avoid. Turning then to the more private branches of our law, we shall take as our chief rubrics 'Ownership and Possession,' 'Contract,' 'Inheritance,' and 'Family Law,' while our last two chapters will be devoted, the one to 'Crime and Tort,' the other to 'Procedure.' We are well aware that this arrangement may look grotesque to modern eyes; since, for example, it thrusts the law of persons into the middle of the law of property. Our defence must be, that after many experiments we have planned this itinerary as that which will demand of us the least amount of repetition and anticipation, and therefore enable us to say most in the fewest words. We shall speak for the more part of the law as it stood in the period that lies between 1154 and 1272. This will not prevent us from making occasional excursions into earlier or later times when to do so seems advisable, nor from looking now and again at foreign countries; but with the age of Glanvill and the age of Bracton we shall be primarily concerned.

Again, we shall be primarily concerned with the evolution of legal doctrines, but shall try to illustrate by real examples some of the political and economic causes and effects of those rules that are under our examination."

As to the manner in which all this well planned work is done, we would gladly illustrate it by quotations, but there is no more room for that. One remarks everywhere a mastery of the subject, a knowledge of the sources, a temperate judgment in using them, and an unrivalled skill and felicity in exposition and statement. For a good specimen of all these qualities let us commend the reader to the pages, at the beginning of Chapter IX. in the second volume, which deal with the Forms of Action. Never was learned legal discourse so delightfully or more profitably carried on. Always the style is that of a master; for, with all its subtle stimulus of pleasure, it is a mere handmaid to the thought.

We are glad to hear that the book is having a wide sale in this country.

J. B. T.

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HANDBOOK OF THE LAW OF TORTS. By Edwin A. Jaggard. St. Paul: West Publishing Co. 1895. (Hornbook Series.) 2 vols. 8vo, pp. xvi, v, and 1307.

The merits of this work are very considerable, and far outweigh its defects. The author leaves the impression of a very able lawyer, who has personally investigated the authorities with great care and judgment, but who has put his book together in haste, and who has been hampered by a defect in the plan adopted by the publishers. Hence there is, to a certain extent, a lack of proportion; in some cases, over-fulness for an elementary work; in other cases, a want of definiteness, and occasional passages which are liable to be misinterpreted. The prospectus of "The Hornbook Series" names as one of its features, notes "containing a copious citation of authorities." This seems a mistake in a work intended largely for students. It would be better to follow, in this regard, those model books, Anson on Contracts and Pollock on Torts, wherein the learned authors merely cite cases enough to illustrate the text, without any attempt to make an exhaustive collection of authorities. No doubt an American author labors under especial difficulties in compressing his citations within narrow limits; inasmuch as "the American law" (to use the words of Professor Huffcut) "is the law of upwards of fifty jurisdictions, while the English law is the law of but one." Still the American writer can take Anson and Pollock for his standard, and follow their example as far as the changed circumstances will permit. A copious citation of cases is likely to react, as it were, upon the text, and is almost sure to mar "the simplicity and conciseness of the author's treatment." To put the criticism in the form of a paradox, it is, in a certain sense, true, that the success of an elementary law book depends on what is left out.

But, after making all deductions for defect of plan and rapidity of execution, the book is a good one. The writer has ideas of his own, and is also familiar with the best ideas of other people, notably the recent English authors who have done so much to elucidate the law of torts, and who are as yet so little known on this side of the Atlantic. Undoubtedly, Sir Frederick Pollock's book, which Professor Jaggard justly places at the head, has been largely used in the United States; but it is probable that comparatively few American lawyers have even heard the names of Clerk and Lindsell, Pigott or Innes. Professor Jaggard has



not made up his book by copying bodily from these authors; but he has made an entirely justifiable use of their works by giving from time to time judicious selections, with proper acknowledgment. Moreover, he has grasped the leading modern conceptions in the law of torts, and has given proof that he is himself an original thinker.

The book fulfils the statement of the Preface, that it "is brought thoroughly down to date." The more important recent cases are generally given; and although, as has been said, fulness of citation may diminish the usefulness of the work to students, yet its value to the practising lawyer is thereby materially enhanced. (See, for instance, note 3 on page 474, containing a full collection of authorities and able comments on the interesting question so recently raised in *Hanson v. Globe Newspaper Co.*, 159 Mass. 293.)

As to the topics which should be dealt with in a treatise on "Torts," there is likely to be some difference of opinion. The writer of this notice thinks that some subjects usually discussed in books on "Torts" should be left to works on "Property," while others (and this includes a large class) should be left to "The Law of Persons." But Professor Jaggard, in including such topics in the present book, is simply following the example of able predecessors.

It seldom happens that all parts of a work are of equal merit. Professor Jaggard's treatment of Conversion seems inferior to his treatment of Deceit; while the chapter on "Wrongs affecting Reputation" is superior to the discussion of Juridical Cause. But the book, taken as a whole, is a distinctly creditable performance.

J. S.

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RESTRAINTS ON THE ALIENATION OF PROPERTY. By John Chipman Gray, LL.D., Royall Professor of Law in Harvard University. Second Edition. Boston: Boston Book Co. 1895. pp, xxix, 309.

The appearance of a second edition of this volume is significant of the rapid change that has taken place in the law regarding restraints on alienation. A dozen years ago, at the time of the first edition, the doctrine which it was one of the purposes of the book to discredit was still in its infancy. As yet few jurisdictions had followed the *dictum* in *Nichols v. Eaton*, 91 U. S. 716, in declaring that a man could enjoy the benefit of his property without being compelled to subject it to the payment of his debts, and the task of the writer at that time was to protest against the growth of this new doctrine, and to show by argument and authority how at variance it was with good morals and previous law. Since then decisions in favor of spendthrift trusts have been so rapidly multiplied that the weight of authority is now on the other side, and the writer almost stands (as he says in his delightful Preface) *vox clamantis in deserto*. This change in the aspect of the courts has given us this second edition, and with it not only a discussion of the more recent decisions, but also an explanation of the causes of this strange departure from the common law view of the incidents necessarily dependent upon ownership. The change is traced partly to the decision of the United States Supreme Court, but more generally to the modern reaction against the *laissez faire* doctrine, to the tendency to drift away from a society founded on contract, and to adopt a system of paternal socialism. Against this modern tendency the writer takes a strong stand in favor of the old doctrine, which, he says, "was a wholesome one, fit to produce a manly race, based on sound morality and wise philosophy."

To the layman who imagines law books to be the epitome of dust and

dryness, this little work of Professor Gray's would be a refreshing revelation. The peculiar nature of the book, combining, as it does, an argument for justice with a collection of the many authorities into one, has given an opportunity for a piece of animated writing, and a demonstration that a law book may be at once both profound and readable.

H. W.

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A TREATISE ON LAND TITLES IN THE UNITED STATES. By Lewis N. Dembitz of the Louisville Bar. St. Paul, Minn.: West Publishing Co. 1895. 2 vols. pp. xvi, viii, 1655.

The present work is the result of three years' constant industry on the part of the author; and the result justifies the labor. It would, however, be more accurately styled a "Digest" than a "Treatise." So far as can be judged by a rapid examination, the author has striven to state clearly and with precision the principles for which the multitude of cases on the subject of Land Titles stand, but has with equal care kept his own individuality in the background. Rarely does he defend or attack a particular doctrine or give us a clue to his own preference. As a digest it is hard to take exception to the two volumes the author has given us; and he may well be content to let it stand as he describes it in his Preface, "his last work." We cannot but admire the painstaking thoroughness which the author displays, and which has enabled him to collect the decisions and statutes of over forty States on so comprehensive a subject, and present them in well classified arrangement.

It is essential to the helpfulness of the work that its scope be fully understood. In the first place, it is a digest of the American law only of Land Titles, and but few English cases are included. It therefore contains next to nothing of mediæval and obsolete law of real property, but deals with the law in its modern shape with little attempt to trace its development. Topics too not directly bound up with the subject of title to land are excluded. Under this head fall the law of easements and of fixtures, and the discussion of remedies by which possession of land is regained. Trusts of land is another topic dealt with only in a summary manner; and the reader is referred to other authorities for a fuller discussion. On the other hand, "Title out of the Sovereign," "The Registry Laws," "Judgments affecting Land," and "Title by Judicial Process," receive in as many different chapters a fuller treatment than is accorded them elsewhere. "Title by Prescription" is excellently treated at length.

Adverse criticism must of course be made on some points. For instance, there is no mention of the various rules for determining the division among riparian owners of land formed by accretion; under the subject of "Deeds," the old indiscriminating distinction is made between "latent" and "patent" ambiguities, and extrinsic evidence is said to be admissible to interpret the deed in the former case, but not in the latter; in the chapter on "Title by Prescription," under the head of "Tacking," the case of *Fanning v. Wilcox*, 3 Day, 258, is cited in support of the rule that "transfer of land with delivery of possession is enough to justify tacking," although it is really one of the very infrequent authorities for the doctrine that successive disseisors may tack. Such defects are however minor.

The author in an appended note (p. 1458) expresses the hope that, by the demonstration of the diversity and uncertainty of American law on



questions affecting land titles which his work affords, some impetus may be given toward concerted effort to remove these defects. To this hope we give a hearty *Amen!*

E. R. C.

PRINCIPLES OF THE ENGLISH LAW OF CONTRACT AND OF AGENCY IN ITS RELATION TO CONTRACT. By Sir William R. Anson, Bart., D. C. L. Eighth Edition. First American Copyright Edition. By Ernest W. Huffcut, Professor of Law at Cornell University. Macmillan & Co., New York and London. 1895. pp. lxii, 456.

The text is that of the English author's eighth edition (1895). It is the same as that of the seventh edition, except for a few minor alterations necessitated by two recent English acts, the Sale of Goods Act, and the Married Women's Property Act of 1893. Few new English cases are cited. Professor Huffcut cites parallel American cases where the American and English authorities are in accord, and indicates carefully all points on which the American authorities are in conflict, either with each other or with the English cases. In his note, however, on the American view of the doctrine of *Scotson v. Pegg* (6 H. & N. 295), and *Shadwell v. Shadwell* (9 C. B. N. S. 159), as to a promise to perform an existing contract with a third person, he fails to notice the very recent case of *Abbott v. Doane* (163 Mass. 433), the only American case which directly supports the English doctrine. Certain cases also, which he cites in support of the American view, are by no means universally admitted to be in point. The citations in connection with Anson's short chapter on Agency and Quasi-Contracts are not numerous. Perhaps it is better so, as Anson's treatment of either subject is meagre. The volume is altogether the most valuable edition of Anson for American students that has yet appeared.

H. C. L.

HUFFCUT ON AGENCY. By Ernest W. Huffcut, Professor of Law in Cornell University School of Law. Boston: Little, Brown, & Co. 1895. pp. xlviii, 234.

The author limits the scope of his treatise to the law of agency "as related to contract." He defines an agent as one who brings his principal into contractual relations with a third party, and excludes from his volume all consideration of the law of master and servant; arguing that "the law governing master and servant belongs to that branch of the law of obligation having to do with torts generally," and that "the same reasons that lead to a separate treatment of contract and tort lead to a separate treatment of agents and servants." It is rather hard to follow this reasoning, and still more difficult to see just how the author derives any advantage from this method of treating the subject. His readers are likely to be disappointed at this total omission of the law of master and servant, which is so analogous to and so generally associated with the law of principal and agent. Aside from this, the book should meet with general approval. It supplies a much felt want for a brief reliable treatise on the law of agency.

Mr. Huffcut's statements are almost uniformly accurate, though his phraseology is original. His citation of authorities is full and general, though he seems to favor recent cases affirming rather than the leading cases establishing the law. On controverted points both sides of the question are fully and carefully presented, and his statements of principles are clear and discriminating. The chapters on Ratification and

Undisclosed Principal are especially noteworthy. The treatment of a principal's liability for the torts of his agent is very meagre. Perhaps this is necessarily so by the elimination of the master and servant cases.

On the whole the book is a worthy addition to the Students' Series. The author is soon to issue a volume of selected cases to be used in connection with the text.

E. K. H.

NEGLIGENCE OF IMPOSED DUTIES, CARRIERS OF FREIGHT. By Charles A. Ray, LL.D., Ex-Chief Justice of the Indiana Supreme Court. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Co. 1895. pp. lxxxi, 1195.

It is a pity that Judge Ray did not choose a better title for his book, since "Negligence of Imposed Duties," besides being exceptionable as a bit of English, does not seem broad enough to describe adequately the contents of a work dealing with every aspect of the law of freight carriers. This is a companion volume to the author's book on Carriers of Passengers, which was published two years ago. Little space is devoted to the discussion of principle, but the object of the book is attained in its exhaustive statement of existing law. Not the least notable portion is a long and excellent chapter on Interstate Commerce. The only fault revealed by a cursory examination is lack of condensation. There is too much repetition, — for example, in § 139, the reader is informed half a dozen times in the course of three pages that misdelivery by a carrier is a conversion. The same topic is frequently brought up in different parts of the work, instead of being treated once and for all. However, no topic is so unimportant as to escape consideration altogether; and it is in just this thoroughness of treatment that the chief value of the book lies.

R. G. D.

UNIVERSITY OF THE STATE OF NEW YORK: STATE LIBRARY BULLETIN. LAW SUBJECT INDEX, 1883-1893. Albany: 1894.

The rapid accumulation of legal literature is exemplified by the catalogue, lately issued by the University of the State of New York, of additions made to its law library during the last ten years. Especially interesting in view of the recent action of the American Bar Association toward a reform in law reporting, noticed elsewhere in this number, is the long list of volumes under the heading "Reports."

CONTRIBUTORY INFRINGEMENT OF PATENTS. By Hubert Howson, of the New York Bar. Washington, D. C.: Press of W. F. Roberts. 1895. pp. 15.

The proposition advanced in this pamphlet is that "you may infringe a patent not only by directly making, or using, or selling the patented invention yourself, without a license, but also by intentionally aiding any one else in such an unlawful act." Though primarily addressed to laymen, this brief treatment of contributory infringement will commend itself to lawyers as well. Appended is a useful list of the leading American cases on the subject.

H. C. L.



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## HAMLIN & CO. *v.* TALISKER DISTILLERY:<sup>1</sup> A STUDY IN THE CONFLICT OF LAWS.

THE question for discussion in this article is the true principle by which to determine what law shall govern as to the intrinsic validity and effect of a contract made between parties living under different systems of law, or having a foreign legal element in it from any cause whatsoever. As a preliminary step, it ought to be stated according to what system of law the question is to be examined. As Professor Dicey has pointed out,<sup>2</sup> the court, in which a question of this nature arises, always decides it in accordance with the law of its own country. A controversy in a Massachusetts court, for example, as to which of several competing systems of law shall be selected and applied to a contract, is always determined in accordance with principles of the law of Massachusetts, the law of the forum; although the expression *lex fori* in the conflict of laws is commonly used in a narrower sense, meaning the law which governs the remedy. To control the remedy, however, is but one function of the *lex fori*.

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<sup>1</sup> [1894] A. C. 202.

<sup>2</sup> 6 L. Q. R. 1; 7 L. Q. R. 113. The principle worked out by Mr. Dicey, in the articles cited, has been stated by other writers on the conflict of laws, and is also known and valued by continental jurists. Windscheid says: "It is the merit of Wächter to have emphasized with energy that the question respecting the applicability of foreign law can be answered only out of the native law, and this conception at the present time is that almost universally prevailing." *Lehrbuch* (7th ed.), I. § 34, note 6. A different view is held by the Franco-Italian school. See Laurent, *Droit Civil International*, ii. Nos. 67-73, pp. 119-138.

There being a general harmony of decision in the courts of England and America upon the conflict of laws, it is not necessary to limit a theoretical discussion of this question to any particular jurisdiction; it may proceed according to the principles of the general common law. In 1760, in the case of *Robinson v. Bland*,<sup>1</sup> Lord Mansfield said:—

“The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom.”

This rule, in a somewhat shorter form, as for example, “the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view,”<sup>2</sup> has often been stated and applied by courts of the highest authority, both in England and America, and, until recently, might justly be looked upon as something settled and fundamental. A tendency to question it has appeared. Professor Westlake, in the third edition of his book, says:—

“Under these circumstances, it may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the contract has the most real connection, and not to the law of the place of contract as such.”<sup>3</sup>

As supporting this proposition, the learned author cites *Jacobs v. Crédit Lyonnais*,<sup>4</sup> and *In re Missouri Steamship Co.*<sup>5</sup> (cases decided since the appearance of his previous edition), and adds:—

“But in both cases a stress was laid by the learned judges on the intention of the parties as the governing element in the choice of a law which is not in accordance with the discussion preceding the §, and which, where the lawfulness of the intention is itself in question, as it was *In re Missouri Steamship Co.*, I still find it difficult to reconcile with the logical order to be followed.”<sup>6</sup>

<sup>1</sup> 1 W. Bl. 234, 257, 258; s. c. 2 Burr. 1077. The two reports differ.

<sup>2</sup> See *The Montana*, 129 U. S. 397, 458.

<sup>3</sup> Westlake, *Priv. Int. Law* (3d ed.), § 212, p. 258.

<sup>4</sup> 12 Q. B. D. 589.

<sup>5</sup> Westlake, *Priv. Int. Law* (3d ed.), § 212, p. 258.

<sup>6</sup> 42 Ch. D. 321.



The test above suggested — “the law of the country with which the contract has the most real connection” — has not been adopted by later decisions; but, on the contrary, increased importance has been given to the intention of the parties as the controlling fact in selecting the applicable law.

In England, *Hamlyn & Co. v. Talisker Distillery* is the latest, and is likely to be a leading case. This was a Scotch action, at the instance of the Talisker Distillery, in right of the extinct firm of R. Kemp & Co., for damages and implement of an agreement made between Hamlyn & Co., merchants in London, and R. Kemp & Co., former owners of the Talisker Distillery in Scotland, whereby Hamlyn & Co. agreed to purchase all grains made by Kemp & Co., and to erect at the Distillery a patent grain-drying machine. Kemp & Co., on their part, agreed to work this machine, and keep it in repair, and to dry and bag up the grain, and deliver it free on board at Carbost, Skye, to the order of Hamlyn & Co., or otherwise, as required. This agreement was signed in London, and contained the following clause: “Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way.” This clause was valid by the law of England, but invalid by the law of Scotland, because the arbitrators were unnamed. Hamlyn & Co. contended that the action was excluded by the clause of reference, and hence the question came to be, which law should govern. The House of Lords decided, reversing the decision of the Court of Session, that the arbitration clause was governed by the law of England, and that further proceedings in the action should be stayed to await the result of the arbitration. The following passage from the speech of the Lord Chancellor, Lord Herschell, will show the grounds of the decision, namely: —

“Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights, either under the whole or any part of the contract, should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractus* is also of importance. In the present case, the place of the contract was different from the place of its performance. It is not necessary to enter into the inquiry, which was a good deal discussed at the bar, to which of these

considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at, and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it." (pp. 207, 208.)

Lord Watson and Lord Ashbourne also delivered careful opinions; and all the judges agreed in the proposition that the question before them depended upon the intention of the parties. While the Lord Chancellor and Lord Watson expressly recognize that the place of making the contract is of importance, they do not accord to that fact any precedence or weight over other material facts; although both declared that it was not necessary to discuss the relative value of the place of making and the place of performance. The effect of the whole case, however, is to raise a grave doubt whether any presumption will be admitted in future, in England, in favor of the law of the place where a contract is made.<sup>1</sup>

On the other hand, the case is a distinct and weighty authority for the proposition that the intention of the parties is the ultimate and controlling fact upon which the selection of the law governing a contract depends. When the decision is read in connection with previous cases, it will be found that this proposition is not new. In 1865, in the case of *Lloyd v. Guibert*, in the learned and closely reasoned judgment of Willes, J., in the Exchequer Chamber, it is laid down as the general principle, "that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have bound themselves."<sup>2</sup> Other passages of like import might be cited both from *Lloyd v. Guibert*, and other cases; and in the usual statement of the rule, as is shown by the form of it above quoted

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<sup>1</sup> Sir Frederick Pollock, *Contracts* (6th ed.), 369 (2), says: "But *Hamlyn & Co. v. Talisker Distillery*, '94 A. C. 6 R. (July) 14, seems rather against any fixed presumption, and see Mr. Westlake's remarks."

<sup>2</sup> L. R. 1 Q. B. 115, 123.



from the opinion of Mr. Justice Gray in *The Montana*, it is clearly implied that if the parties manifest an intention to be bound by some law other than that of the place of making, such intention would be effective.

The intention of the parties in respect to the law under which they contract may be expressly declared, or it may be inferred from circumstances. The case of *Hamlyn & Co. v. Talisker Distillery* must be considered as a case falling under the former class. It is true the contract does not contain an express provision that it shall be governed by the law of England, but the clause of reference referred so directly to London, and the usages of the London Corn Exchange, that, by construction, it was equivalent to an express incorporation of the English law. It was so treated by the judges. Lord Watson said: —

“If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles. And, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act ‘in the usual way,’ or, in other words, in the manner which is customary in London, indicates, not less conclusively, that, in agreeing to such an arbitration, they were contracting with reference to the law of England.” (pp. 212, 213.)

In the absence of any declaration of intention in the contract, whether express or derivable from it by fair construction, the court is obliged to consider all the circumstances from which a mutual intention in regard to the governing law may be inferred. These circumstances will now be reviewed.

1. If the contract or clause in question is valid by the law of one country, and invalid by the law of the other country, that is a circumstance of great cogency in favor of applying the law by which the agreement will be upheld. The reason is, that as the parties have entered into a transaction intended to have legal consequences, this intention implies a submission to that law which will enforce the agreement. In *Hamlyn & Co. v. Talisker Distillery*, the clause of reference was valid by the law of England, and invalid by the law of Scotland. This fact was considered by the judges. Lord Herschell said: —

“As I have already pointed out, the contract with reference to arbitration would have been absolutely null and void if it were to be governed

by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England." (pp. 208, 209.)

Lord Ashbourne said:—

"This interpretation gives due and full effect to every portion of the contract; whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed. It is more reasonable to hold that the parties contracted with the common intention of giving effect to every clause, rather than of mutilating or destroying one of the most important provisions." (p. 215.)

Without asserting that this circumstance is conclusive, it should always be considered, and has been referred to in several important decisions<sup>1</sup> as a circumstance of great weight.

2. The reason for the importance of the place of making a contract has been thus explained:—

"The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court, interpreting or enforcing it upon any contrary rule, defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."<sup>2</sup>

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<sup>1</sup> *Re Missouri Steamship Co.*, 42 Ch. D. 321, 337, 341; *Peninsular & Oriental S. S. Co. v. Shand*, 3 Moo. P. C. N. S. 272, 291; *Pritchard v. Norton*, 106 U. S. 124, 137; *Bell v. Packard*, 69 Maine, 105, 111; *Wharton*, *Confl.* (2d ed.), § 429. See also *The Montana*, 129 U. S. 397, 460, 461.

Savigny (*Guthrie's transl.*, 2d ed., § 372, p. 223), says it has been asserted that the local law which will best support the juridical act in question must always be applied. For this proposition, to which Savigny does not assent, the only authority cited is Eichhorn, *Deutsches Privatrecht*, § 37, notes *f, g*. The passage in Eichhorn refers to cases where the *locus contractus* is doubtful, as in the case of contracts concluded by letter, and rests upon D. 45. 1. 80: *Quotiens in stipulationibus ambigua oratio est, commodissimum est id accipi, quo res, qua de agitur, in tuto sit.* (ULPIAN.)

<sup>2</sup> *Turner, L. J.*, in *Peninsular & Oriental Steamship Co. v. Shand*, 3 Moo. P. C. N. S. 272, 290.



In that part of the passage here quoted from Lord Justice Turner which refers to the principle of allegiance, whether permanent or temporary, an implication is suggested that the law of the place where the contract is made is imposed upon the parties and governs their agreement without reference to their intention. This implication, however, is destroyed by the remainder of the passage, which clearly refers the application of the law of the place of contracting to the will of the parties themselves. If, then, the law of the place of making applies by virtue of an "agreement in fact," such agreement must be based upon mutual intention. The presumption in favor of the law of the place of making, called a presumption *de jure*, is conceded to be rebuttable, and can therefore be controlled by evidence of a different intention. Being merely evidence, it also follows that the place of making may be of different degrees of importance in different cases. For example, in a case like *Jacobs v. Crédit Lyonnais*,<sup>1</sup> where two English mercantile houses, carrying on business in England, made a contract in London, to be performed partly in Algiers, where the law of France prevails, the place of making the contract is a fact of great importance, and was so treated by the court. On the other hand, in the case of a contract concluded by correspondence, or by telegraph or cable, or even by an agent, the place where the contract is made has very little, if any, tendency to show a mutual intention to submit to the law of that place. Furthermore it is often difficult to decide where a contract *inter absentes* was in fact concluded.<sup>2</sup>

Finally, the place where a given contract was concluded may be determined differently by different systems of law. Such a difference may be a question of practical importance in a case where there is a conflict between the common law and the law of a coun-

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<sup>1</sup> 12 Q. B. D. 589.

<sup>2</sup> It cannot be expected that this difficult subject, having a literature of its own, will be discussed here. Usually the question of the place where a contract is completed is not separated from that of the time when it is completed. Professor Langdell's discussion of the latter question is too well known to the readers of this REVIEW to need citation. See Holmes, *The Common Law*, 305; 7 *Am. Law Rev.* 433. The point is a subject of controversy among the continental jurists. Windscheid, *Lehrbuch* (7th ed.), II. § 306, and note 10; Savigny (Guthrie's transl., 2d ed.), § 371, pp. 214-216; Bar, *Priv. Int. Law* (2d ed.), §§ 270, 271. Also § 128, note E, p. 289. See Laurent, *Droit Civil International*, vii. Nos. 447 *et seq.* In the case of a unilateral contract, the place where the consideration is furnished would seem to be the place of making. *Milliken v. Pratt*, 125 Mass. 374. The nature of the consideration, however, may be such as to require acts to be performed in several different jurisdictions.

try governed by the Roman or continental system.<sup>1</sup> If such a case the place where the contract was made can be of no assistance whatever. To decide by either of the competing systems of law where the contract was made, and then to infer from the place where it was made what law should govern it, would be mere reasoning in a circle.

3. It will not be necessary to dwell long upon the place of performance. Its importance has always been placed upon the true principle, namely, that it has a tendency to show the intention of the parties. Thus Willes, J., in *Lloyd v. Guibert*, says the law of the place of making the contract ought to prevail, in the absence of circumstances indicating a different intention, "as, for instance, that the contract is to be entirely performed elsewhere."<sup>2</sup> Upon this ground the place of performance has often been allowed to override the presumption arising from the place of making, but like the place of making, its value as evidence of intention varies greatly in different cases. In some contracts the place of performance is expressly fixed; in others it is left to construction and inference from extrinsic facts; in still others, as in contracts of carriage, the performance may be partly in several different jurisdictions;<sup>3</sup> and again, of the different stipulations in the same contract, some may be performable in one jurisdiction, and some in another, as in *Hamlyn & Co. v. Talisker Distillery*, where the obligation of Kemp & Co. to deliver free on board at Carboist, Skye, was performable in Scotland, while the clause of reference was performable in London, and required the co-operation of both parties there.<sup>4</sup> It may also happen that in a given case the conflicting systems of law would fix different places of performance for

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<sup>1</sup> Article 321 of the General German Commercial Code provides: "In the case of a contract concluded between parties at a distance, the time at which the contract is concluded is held to be the time at which the declaration of acceptance is delivered for forwarding."

"The place from which the declaration of acceptance is sent is the place of concluding the contract." F. Lithauer's note to Art. 321 above, citing Decisions of the Reichsoberhandelsgericht, vii. (2d ed.) 11.

<sup>2</sup> L. R. 1 Q. B. 115, 122.

<sup>3</sup> In *Cohen v. South Eastern Ry. Co.*, a contract for passage between Boulogne and London, Brett, J. A., suggested that the law of each country might govern that part of the contract which was performed within it. 2 Ex. D. 253, 262, 263.

<sup>4</sup> In order to appreciate the full import of this case as an authority, it should be noticed that the clause of reference was both made in England and performable in England. The law of England might have been applied upon that ground, in accordance with a long line of previous decisions; but the House of Lords proceeded wholly upon the ground of the intention of the parties derivable from the contract.



the same stipulation.<sup>1</sup> The only rule which can be affirmed is that the place of performance, like the place of making, is a fact to be considered in each case, in connection with the other facts, as evidence of the intention in regard to the governing law. Even Savigny, who maintains that the place of performance determines the law which shall govern the contract, and in deference to whose authority that is the prevailing view in Germany, rests his theory upon the inference of a voluntary submission of the parties to the law of that place; but this inference he says is always excluded by an express declaration to the contrary.<sup>2</sup>

4. The forum, or place where suit is brought, is a circumstance sometimes referred to as tending to show the intention of the parties. In *In re Missouri Steamship Co.*, a claim against an incorporated English company, in voluntary liquidation, by an American shipper, upon a contract made in Massachusetts for damage to cargo by reason of the negligence of master and crew, the question being what law should govern a clause in the charter party exempting the owners from liability for such negligence, Lord Justice Fry, in the course of the argument, said: "The clause is put in for the relief of the ship-owner. The natural forum for attacking an English ship-owner is England. Ought not the English law to govern?"<sup>3</sup> The Lord Chancellor, Lord Halsbury, also took the same point. The argument is, that the place where a remedy for breach of the contract, or any stipulation in it, is likely to be sought, is a circumstance tending to show a mutual intention to contract with reference to the law of that place. But as a rule the parties, at the time of making a contract, do not contemplate a breach, nor do they know with any certainty in what forum a remedy for breach will be sought. It may be conceded that there is always a probability that suit will be brought at the domicile of one of the contracting parties; but under the rules of the common law an action may be brought and prosecuted with effect in whatever jurisdiction the person of the defendant can be found,<sup>4</sup> or, in some cases, where his goods can

<sup>1</sup> Some of the continental codes contain provisions regulating the performance of contracts, and fixing the place of performance. General German Commercial Code, Arts. 324, 325; Civil Code of Saxony, §§ 702-710.

<sup>2</sup> Savigny (Guthrie's transl., 2d ed.), § 369, p. 196; § 372, p. 223.

<sup>3</sup> 42 Ch. D. 321, 333.

<sup>4</sup> Story, *Confli.* (8th ed.), §§ 538, 549; Westlake (3d. ed.), p. 212; Bar (2d ed.), 934, *et seq.*, Mr. Gillespie's note; *Peabody v. Hamilton*, 106 Mass. 217.

In the Roman law, according to Savigny's exposition, the forum would be of much

be attached. There is no general or fixed presumption that suit will be brought at the domicil of the defendant rather than of the plaintiff. In fact, as the choice of the forum rests with the plaintiff, he is likely to select that forum where the law will be most favorable to his claim. As a rule, therefore, the circumstance of the forum must be considered of slight importance in determining the governing law.

5. Nationality of the parties, a circumstance of great and increasing importance in private international law on the continent of Europe,<sup>1</sup> is seldom referred to, as an independent fact in contradistinction to domicil, by courts administering the common law. The domicil of the parties, a fact of the greatest importance in questions of personal status and capacity, and in the contract of marriage, although often mentioned in questions relating to the law which shall govern an ordinary contract, is seldom made the basis of elaborate argument. In *Hamlyn & Co. v. Talisker Distillery*, the residence of the parties was mentioned,<sup>2</sup> but no special importance was attached to it.

When both contracting parties have the same domicil, the inference is strong that they are dealing with reference to the system of law under which they are living. What is to be said when the parties have different domicils?

Professor Bar contends that the law of the debtor's domicil is, in principle, the true starting-point from which to determine the governing law. He gives the preference to the domicil of the debtor, for this reason, "that the general propositions of law in the matter of obligations, the rules which do not give way to the pleasure of the individuals, exist generally in the interest of the debtor." Further, he says: "The person of the debtor is without doubt more closely bound up with the whole legal relation than that of the creditor." And the debtor must be understood as promising performance in the sense of the law which he knows, that is, to which he is personally attached.<sup>3</sup> This theory, however, cannot be accepted. It cannot be admitted that a preference should be

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greater significance as to the intent of the parties, since suit had to be brought either at the domicil of the defendant or within the forum *contractus*, so called, the plaintiff having his election between those places. Savigny (Guthrie's transl., 2d ed.), § 372, p. 223.

<sup>1</sup> See Bar (2d ed.), § 28, p. 252.

<sup>2</sup> [1894] A. C. 206, 211, 213.

<sup>3</sup> Bar (2d ed.), § 250, pp. 543-546; § 249, p. 539.



given to the personal law of the promisor or debtor, that is, generally speaking, to the law of his domicil. The parties have an equal interest in the obligation. If, on the one hand, the promisor or debtor must be understood to promise in accordance with the law of his domicil, it must be supposed that the creditor or promisee understands the promise and expects performance in accordance with the law of his domicil. Assuming that each party is ignorant of the law of the other's domicil, neither can justly contend that the obligation should be governed by his law. The fact of domicil, when the parties have different domicils, is in itself of no assistance in determining the governing law, because it has no tendency to prove a mutual intention, which is the controlling fact. When the contract is made *inter absentes*, by correspondence or otherwise, this proposition is clear. It is equally true, however, when one of the parties goes to the domicil of the other, and concludes the contract there. The importance to be given to the place of making the contract in such a case is greatly increased; while that of domicil remains unaffected.<sup>1</sup>

6. Other circumstances tending to throw light upon the question of the intention of the parties have been referred to in different cases by the courts. If the parties belong to different nations and speak different languages, the language used in making the contract, especially if it be in writing, may be of great importance. The same may be said of the form of the contract, if it is peculiar to the country of one of the parties, or of the use of legal terms peculiar to the law of one of the parties.<sup>2</sup> The circumstances which may become material in different cases are scarcely capable of being enumerated, much less of being assigned any fixed weight.

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<sup>1</sup> In order to apply the theory of the law of the debtor's domicil to a bilateral contract, the ingenious suggestion was made that such a contract can always be treated as made up of two separate unilateral contracts, each party being a debtor in respect to what he promises. Savigny (Guthrie's transl., 2d ed.), § 369, p. 195; Bar (2d ed.), § 250, p. 545. This suggestion, even if admitted to be sound, does not affect the argument. An unwarranted preference is still given to the law of the debtor. As to dividing a contract in the way suggested, see Laurent, vii. No. 450, p. 540.

Professor Bar (in § 250, p. 543) names Windscheid as among the adherents of his theory, which has strong supporters in Germany. Windscheid says: "The point of space to which binding legal relations belong, is determined through the domicil of the parties. In and by itself, not less through the domicil of the creditor than of the debtor." Lehrbuch (7th ed.), I. § 35. 3. Further, in a note to this section, note 4a, he criticises the position of Bar, and the similar position of Savigny, that the person of the debtor is more closely bound up with the entire legal relation than that of the creditor.

<sup>2</sup> See Nelson, Private International Law, 276; Krell v. Codman, 154 Mass. 454, 457.

The only principle which can be stated is that the materiality of circumstances depends in all cases upon their tendency to show the intention of the parties, while their weight must be determined by the circumstances of each individual case.

7. It is always to be assumed, of course, that the parties are dealing upon the basis of good faith. If, therefore, it should appear that one party, at the time of the contract, entertained an expectation in regard to the law which should govern it, and that the other party had knowledge, or ought to have had knowledge, of this expectation, *bona fides* may require that the law so contemplated by one party shall be applied. This consideration may modify the effect of any or all of the foregoing circumstances in a particular case.<sup>1</sup>

If the intention of the parties to a contract is to be the controlling fact in the choice of a governing law, it is important to understand in what sense that expression is used. In most cases it is probable that the parties at the time of contracting do not contemplate the possibility of a question as to what law shall govern, and therefore entertain no conscious intention upon the point. In *Hamlyn & Co. v. Talisker Distillery*, it is very unlikely that either party knew or even suspected that the arbitration clause was void by the law of Scotland and valid by the law of England, and that it might be necessary to determine which law should govern. Nevertheless, the House of Lords held that the language of the contract clearly showed a mutual intention in respect to the governing law. The case is an authority for the proposition that the expression "intention of the parties," in the choice of a governing law, is used in the same sense in which it is used throughout the law of contracts. The law cannot look into the minds of parties; but it takes note of what they say and do, and determines their intention from their external acts.<sup>2</sup> In cases where there is nothing in the language of the contract to show intention, the principle is the same. The question then is, What intention is reasonably to be inferred from all the material circumstances? or, as it was stated by Willes, J., in *Lloyd v. Guibert*, "to what general law it is just to presume that the parties have submitted themselves in the matter."<sup>3</sup> The point to be emphasized is, that

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<sup>1</sup> See Bar (2d ed.), § 251, p. 548; § 253, p. 553.

<sup>2</sup> Pollock, Contracts (6th ed.), 5; Holmes, The Common Law, 309.

<sup>3</sup> L. R. 1 Q. B. 115, 120, 121.



the intention sought is a true intention, in the sense of the law of contracts: that is, the reasonable meaning of the acts and language of the parties in view of all the material circumstances in the case.<sup>1</sup> It is not a rule of law imposed upon the parties, under the pretence, or fiction, of enforcing a mutual intention.

The chief practical objection which can be urged against abandoning the presumption arising from the place of making a contract is the uncertainty of decision which may result. But uncertainty exists under the present rule. In the important case of *The Montana*, which has already been referred to, a contract of affreightment between an American shipper and ship-owners having a place of business in New York and also in England, made and dated in New York and signed by the ship's agent there, contained a stipulation exempting the owners from liability for negligence of the master and crew, which was valid by the law of England, but void by the law of America as declared by the Federal, and many of the State Courts. The Supreme Court of the United States held that the American law applied, on the ground that a contract is presumed to be governed by the law of the place where it is made, and that there were no circumstances in the case to control the presumption. Soon afterwards, the English Court of Appeal, in the case of the *Missouri Steamship Company*, already cited, a case involving a similar stipulation, and presenting similar facts, reached an opposite conclusion. The Supreme Court in a very learned opinion by Mr. Justice Gray, collated and relied upon a long line of English decisions, while the Court of Appeal apparently assented to the general rule of law as it was stated in *The Montana*, but held that the contract and the circumstances showed an intention of the parties to be governed by the law of England. These de-

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<sup>1</sup> "By 'intention' however we must always remember is meant, not the expressed or even the consciously entertained intention of the particular persons, but the intention which in the opinion of the Court most persons in the position of the particular parties would have entertained had their minds been called to the matter at the moment of entering into a contract or other legal transaction." 7 L. Q. R. 126 (A. V. Dicey).

Laurent expresses the thought in nearly the same form: "*Car il ne faut point perdre de vue que le législateur est obligé de présumer ce que les parties auraient voulu, si elles avaient pensé à la loi qui régira leurs conventions.*" vii., No. 441, p. 531.

Professor Bar contends that it is misleading to reason from the intention of the parties, apparently upon the ground that the governing law is selected by positive rules independent of intention. Bar (2d ed.), § 247, pp. 536-538. He admits, however, that the decisions of the Imperial Court of Germany are opposed to his view.

cisions illustrate the uncertainty of the result in applying the existing rule. They also caused a diversity in the law of the two countries in an important class of maritime contracts.<sup>1</sup> Since the decision in *Robinson v. Bland* in 1760, in which Lord Mansfield laid down the rule in favor of the law of the place of making a contract, the conditions of commercial intercourse have undergone a revolution. Steam and electricity must have their effect on legal rules, and it is doubtful if there is any practical advantage or justice in maintaining this presumption longer.

On the other hand, it is not to be asserted that the intention of the parties, even if it is the true principle to be applied, will, in all cases and without limitation, determine the governing law. Only one of those limitations will be stated here. In *Hamlyn & Co. v. Talisker Distillery*, the clause of reference was void by the law of Scotland as against public policy, and it was argued that her courts should not be compelled to enforce it, even if the contract was governed by the law of England, and valid.<sup>2</sup> This argument was overruled by the House of Lords, upon the ground that since the Scots law permitted a reference where the arbitrators were named, an agreement in which they were not named could not be said to violate any fundamental or essential considerations of public policy. If the clause of reference had been in violation of such considerations, even though not *contra bonos mores*, nor criminal, nor expressly prohibited, it was implied by the judges that the courts of Scotland would not be compelled to enforce it. In other words, a contract may be valid, but not enforceable, and this distinction is of practical importance in the conflict of laws. The reader will find further illustration and discussion of the point in the recent interesting case of *Emery v. Burbank*,<sup>3</sup> by Mr. Justice Holmes.

*William Schofield.*

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<sup>1</sup> *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *The Gaetano and Maria*, 7 P. D. 137; *The Industrie*, [1894] P. 58. See also *The August*, [1891] P. 328.

<sup>2</sup> As to the relation between the judicial systems of England and Scotland, see Bar (2d ed.), p. 94, Mr. Gillespie's note.

<sup>3</sup> 163 Mass. 326. In this connection it may be mentioned that after the decision in *The Montana*, it was usual for English ship-owners to insert in bills of lading, and contracts of charter party a clause providing that all disputes should be decided according to British law; or, that the contract was made with a view to the law of England. *The Iowa*, 50 Fed. Rep. 561; *The Energeia*, 56 Fed. Rep. 124; *The Hugo*, 57 Fed. Rep. 403; *The Guildhall*, 58 Fed. Rep. 796; *The Majestic*, 60 Fed. Rep. 624; *The Glenmavis*, 69 Fed. Rep. 472. This clause was generally held ineffective. According to the distinction taken in *Hamlyn & Co. v. Talisker Distillery*, the inquiry should be



whether the public policy involved is something essential or fundamental. If it is, a contract or stipulation in violation of such policy will not be enforced by the courts of a country where it exists. Nor is it material where the contract was made, or what law the parties had in view. In *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, a contract for an ocean passage, made in England, and exempting the carrier from liability for negligence, was enforced, "notwithstanding that a similar contract made in Massachusetts would be held void as against public policy." (p. 557.) See also *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356; and compare *Rousillon v. Rousillon*, 14 Ch. D. 351. The point whether the policy in question was fundamental was not raised in any of those cases. By Act of Congress, Feb. 14, 1892, 27 Stat. L. 445, contracts exempting from liability for negligence of master and crew were prohibited.

LOTTERY BONDS IN FRANCE AND IN THE  
PRINCIPAL COUNTRIES OF EUROPE.<sup>1</sup>

- I. Definition : Questions of Law raised by Lottery Bonds.
- II. Concerning the Issue of Lottery Bonds.
- III. Concerning the Negotiation of Lottery Bonds.
- IV. Concerning the Payment of Lottery Bonds.
- V. International Law.
- VI. Economic and Legislative Survey.

THE negotiable instrument which current expression and financial usage designate by the special name of "bond" has spread through all the civilized countries of the world. It is primarily a deed of loan which is destined to circulate in the public market, in the exchange and bank; in a word, it is a public evidence which represents a credit. Nevertheless, if the original type of bond, which, from a legal standpoint, is a simple deed of loan identical in nature with a note issued by a private individual, is thus found universally circulated, it is by no means the same with all kinds of bonds which are capable of being bought or sold in any of the public exchanges. In fact, there exists in a certain number of countries a class of bonds called lottery bonds,<sup>2</sup> which by reason of their peculiar form, and of the peculiar rights which they confer on the holder, could not be freely issued or universally circulated. It is this category of bond which especially forms the subject of the present investigation.

Lottery bonds have nothing at first sight to distinguish them from the ordinary bond. Like the latter, they can be made out payable to order or to bearer; like the latter, also, they are usually provided with coupons representing interest to be paid; and, like the latter, they as well bear the number of issue. But it is precisely the different use of these numbers which marks the difference between the two classes of obligations. In the ordinary bond the number of issue serves solely to facilitate the redemption of the

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<sup>1</sup> For the translation of this article from the French, the Editors are under obligation to Mr. Philip Ogden, of Johns Hopkins University.

<sup>2</sup> In France, Obligations à lots, Valeurs à lots; in Germany, Prämienobligationen, Prämienpapiere, etc.



amount loaned. It must not here be forgotten that European loans which are effected by means of issuing bonds are redeemable gradually; that is to say, that every year a certain number of bonds chosen by lot are called in for payment. In the lottery bond, however, the number of issue printed on the instrument presents a very different character. It is not merely a number of issue which permits the arrangement of a gradual liquidation, but it is primarily the number of a lottery ticket. The essential characteristic of the lottery bond is that the number which it bears shares till its liquidation in periodical drawings of more or less important prizes, together with the other bonds of the same issue which have not been paid. These prizes consist of sums of money, which are sometimes of considerable value (200,000 and 500,000 fr.). In practice, the drawings for payment are made to coincide with drawings for prizes, and it is so arranged that the holders of the bonds whose numbers appear first at the drawings for payment shall be the beneficiaries of the prizes.<sup>1</sup>

It is then evident that the lottery bond presents a double character. It is at once (1) *a deed of loan*, and (2) *a lottery ticket*. As *deed of loan*, it confers upon the holder the right to the payment of interest and reimbursement of the capital lent; as *lottery ticket*, it takes part periodically in drawings of more or less important prizes. The lottery bond may then be defined as *that bond to which is attached the contingent right to a prize*, or, if preferred, *the vested right to chances at lottery*.

Such is the double aspect which the lottery bond presents. At present it may be found in most of the financial markets of Europe, and of all nationalities, German, Austrian, Spanish, Greek, Italian, Russian, Swedish, and Swiss. Especially is this true in France. The many lottery loans placed by the city of Paris, the lottery bonds of the Crédit Foncier, the Companies of Suez and Panama, are too well known to dwell upon. So it will suffice to cite the names here as examples. We must also here ask pardon for not tracing in detail the historical origin of these bonds, which appeared in their existing form at the close of the lottery loans of the eighteenth century. This would doubtless furnish a most interesting financial and historical investigation, but it is not the feature to which we would call attention in the present sketch,

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<sup>1</sup> Most of the time, also, the total of the payment is deducted for the winning bonds from the total of the prize won, so that the prize seems only a kind of payment with premium.

which is purely and exclusively legal. Our sole purpose is to give here a rapid glance at the many legal problems of a particularly delicate solution, which are occasioned by the issue, the negotiation, and the payment of lottery bonds.

Let there, then, be no misapprehension of the questions under consideration. When we speak of issue, of negotiation, of payment, we do not have in view the processes by which the lottery bond is issued, negotiated, and paid; for the instruments of which we are about to treat, these processes are not materially different from the methods in use in issuing, negotiating, and paying ordinary bonds. Our chief interest lies in the legal difficulties which are encountered in issuing, negotiating, or paying these securities, — difficulties which are not met with in ordinary bonds, and which arise solely from the concurrent lottery privileges attached by the borrower at the first issue. A lottery bond, as we have said, is the combination of a deed of loan and of a lottery ticket. We will now investigate the influence which this combination has upon the legality of the issue, of the negotiation, and of the payment of such instruments.

## II.

In all civilized countries the lottery is forbidden by penal law. Experience, old as the world, has taught that the kind of gambling in which the gambler may at once attain wealth by the payment of a small deposit excites in the highest degree the passion and cupidity of mankind. Strong, indeed, are they who resist the fascination of fortune's wheel. Many governments have turned this means of temptation to their profit, and many states at this very hour number the lottery among their most important fiscal resources. In Germany, Austria, Spain, Italy, and Denmark the state lottery appears as a powerful and reliable means of revenue. In France the state lottery existed until 1832, when this institution was abolished by law, a measure dictated to the French legislator by a sentiment of high moral feeling. In many countries of Europe state lotteries have been abolished (England, Sweden, etc.). Private lottery is forbidden in all the countries which we have enumerated above. The establishment of a lottery is a misdemeanor *per se*, and falls under the jurisdiction of the penal law. This prohibition is based on two very different motives. In the countries where the state lottery still exists for the purposes of revenue, and furnishes the public treasury its surest resources, the



prohibition of private lotteries appears as a measure intended to protect a state monopoly. In those, on the other hand, where the state lottery has disappeared or has never existed, the interdiction of lotteries is based on high moral feeling. Such, then, is the double character which the unanimous suppression of lotteries in Europe presents.

Lotteries are forbidden. Do lottery bonds fall within the range of this prohibition?

The practical interest of the question is great. If the decision be that the issue of lottery bonds is an act contrary to the laws which forbid lotteries, then the logical consequence is that this act should not lawfully be attempted except by virtue of a special law. Otherwise, those who avail themselves of an issue of bonds of this nature would be liable to the penalties exacted by these laws, and the holders would have no right to demand the promised prizes.

In France the question is considered in the text of the law of the 21st of May, 1836; the first two articles read as follows:—

“Art. 1. Lotteries of all kinds are forbidden.

“Art. 2. The following are considered lotteries, and as such forbidden: the sale of landed property, of personal property, or of merchandise, effected by the means of lot, or of any property to which may have been attached either premiums or other benefits due to lot, and, in general, *all transactions offered to the public to arouse the hope of gain procured by lot.*”

It was the last words of Article 2 which gave rise to a vehement controversy in regard to the issue of lottery bonds. This controversy started in 1868. At this time the Imperial government presented the Legislative Body with a bill which had been already considered in the Council of State. The object was to authorize the Maritime Company of the Suez Canal to issue bonds payable with prizes drawn by lot. This was the first time that the legislative power had been directly required to give a decision on such a question. Among the many lottery-bonds which were negotiated at this time in the market of transferable securities, none had been issued in this manner. A parliamentary incident in 1865, moreover, had impelled the Imperial government to take a position on this point, and the Minister of State, M. Rouher, had then declared that the law concerning lotteries was not to affect lottery bonds.<sup>1</sup> At

<sup>1</sup> Discussion of the Legislative Body, Session of 9th June, 1865, — On the issue in France of the Mexican loan effected through lottery bonds.

the Session of the Legislative Body of the 16th June, 1868, the opposition, represented by the Lanjuinais deputies, Marie and Jules Favre, vigorously resisted the bill which was to authorize the Company of Suez to issue lottery bonds. By the overwhelming majority of 183 votes to 8, the Legislative Body adopted the measure. But one cannot draw any exact legal significance from this vote, for, by reason of the subtlety of the debaters of the government, it was impossible to decide whether the Legislative Body, in granting its sanction, with this authoritative interpretation of the law of 1836, had decided that the law was not applicable to lottery loans, or if, adopting the contrary position, it granted its sanction because the undertaking under consideration deserved to have the prohibition of this rigorous law removed.

To-day, however, in France the controversy has subsided. It is unanimously admitted that the issue of lottery bonds is a transaction falling under the jurisdiction of the law of 1836. This position, affirmed by a celebrated decision of the Cour de Cassation, in 1876,<sup>1</sup> by the government in 1877,<sup>2</sup> and by most writers, was definitively established by the French Parliament in a striking manner in 1888. This decision, in short, authorized the Company of the Interoceanic Canal of Panama to issue lottery bonds by express infringement of the law of 1836.<sup>3</sup> It is therefore admitted in France that *no issue of lottery bonds can take place without special sanction by the legislative power.*

This position is justified by the text of the law; there can be no doubt that the issue of lottery bonds is one of those transactions offered to the public to arouse the hope of gain acquired by lot. The contrary could not be seriously maintained, and in fact has never been used as argument.

If from France we pass to the other countries of Europe, we see that the same conditions prevail everywhere, with one exception. In all countries except *Spain* the issue of lottery bonds is assumed to fall under the prohibition of lotteries. In *Germany* the state lottery has been in existence in most of the states, notably in

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<sup>1</sup> Cour de Cassation, Criminal Chamber, 14th January, 1876.

<sup>2</sup> Decision of the Minister of Justice, dated 8th June, 1877, forbidding the advertisement of foreign lottery loans and the publication of the lists of drawings.

<sup>3</sup> Article 4 of the law of the 8th July, 1888, ordains that all prospectuses, publications, bonds, etc., published by the Company of Panama bear the notice, "Loan authorized in accordance with the law of the 21st May, 1836, by the law of the 8th June, 1888."



Prussia, since the time of Frederick II. The issue of lottery bonds, which was very frequent about 1860, was disapproved by the economists at the Congress of Hanover in 1864, and a restrictive law was the result of this condemnation. The law of the Empire of the 8th of June, 1871, forbade the issue of lottery bonds payable to bearer throughout the Empire, except Imperial loans, or loans of one of the confederate states authorized by a law of the Empire. In *England*, by the act of 10 & 11 Will. III. c. 17, all lotteries were declared a public nuisance, and suppressed. This prohibition was renewed by frequent statutes.<sup>1</sup> Lottery bonds fall under this restriction, and an issue of these obligations has never been authorized by Parliament. In *Austria* the issue of lottery bonds, which was formerly possible by a simple official sanction, is restrained to-day by the law of the 9th of March, 1889. This law provides that the state alone shall issue lottery bonds, and then only by means of a special law, when it is required to promote public interests. A *Hungarian* law of the 21st of April, 1889, lays down the same restriction in Hungary. In *Belgium* the law of the 31st of December, 1851, drafted in almost the same terms as the French law of 1836, forbids lotteries. Lottery bonds fell under this prohibition. Corporations, however, whose existence was contingent on the authorization of government, still preserved the right to issue them. When government control of corporations ceased, the necessity of controlling the issue of lottery bonds arose, and the practice was forbidden by Article 68 of the law of the 18th of May, 1873. In *Greece* a law of the 4-16 of January, 1888, on lotteries, forbids the issue of lottery bonds, unless they shall be specially authorized by the government. In *Italy* the royal decree of the 21st of November, 1880, on lotteries, giving a decision under the law of the 19th of July, 1880, forbids, in its Article 3, "*every transaction in which gain, or the drawing of a prize in money, depends upon the drawing of a lot.*" The issue of lottery bonds falls within this prohibition. Finally, in *Sweden* and *Russia* a similar prohibition may be found, and official sanction is required preceding each issue of lottery bonds.

### III.

We have just seen under what restrictions the right to issue lottery bonds is placed in most countries of Europe; we have also

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<sup>1</sup> 12 Geo. II. c. 28; 13 Geo. II. c. 19; 18 Geo. II. c. 34; 42 Geo. II. c. 119; and finally 4 Geo. IV. c. 60.

observed under what conditions an issue of bonds of this kind is in accordance with existing legislation; we have carefully remarked what issues are legal and valid, and what, on the contrary, fall under the jurisdiction of the penal law, and are invalid by the civil law. It now remains for us to pronounce on the character of sales of lottery bonds which have been duly authorized.<sup>1</sup> The transfer of these bonds has raised, and still raises, much controversy. It has furnished the courts with a multitude of cases, all very delicate to analyze, and therefore the question presents an extreme interest which demands special attention.

The conditions may be formulated as follows. Lottery bonds are undoubtedly in trade, and consequently can be sold in the same manner as bonds to which no lot is attached. But by reason of these lottery chances the sellers often have recourse to different schemes with the intention of interesting a large number of people and attracting buyers. Lottery bonds are popular with the public, which is greedy for all transactions of chance; the greater the chance, the greater the number of speculators. Nothing is simpler for the proprietor of lottery bonds than to modify those which he owns in such a way that the lottery chances can be offered to the public under the most advantageous conditions. A fruitful business must follow attractive offers. Now, are all these contrivances to be considered lawful?

In *France* the answer is, No. The trade in lottery bonds is not unrestricted. The sale of such obligations is not a contract in which the terms are definitely fixed by the parties. It is essentially controlled by the restriction of the law of 1836. Lottery bonds, says French legal theory, may not be the object of free transfer as other public funds; for the issue of such bonds, constituting on the whole a "forbidden lottery" in the acceptance of the law of 1836, was authorized by a special law by way of exception. Now, when a special law infringes in this way that of 1836, it only does so in a certain degree and under certain conditions. It purposes to render a sound loan successful by adding the charm of a contingent gain. It thus gives a certain moral sanction to a human failing which deserves little encouragement, the hope of gain without work. The Legislative Body has permitted the future lender, under certain conditions only, to attach lottery chances to

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<sup>1</sup> It is needless to say that there could be no question in a sale of lottery bonds which have not been authorized. A lottery bond of which the issue has not been authorized is *res extra commercium*, and cannot become the object of a valid sale.



the deeds of loan which he is preparing to put in circulation. These conditions are made the subject of express clauses in the law of authorization. The authorization has only been granted to bonds which conform to certain regulations. It has established a certain proportion between the face of the bond, the yearly interest, and the total of the prizes, arranging in this way beforehand the amount of chance which may be offered to the public.<sup>1</sup> The seller of a lottery bond, then, like the original circulator, must refrain from infringing the essential conditions of the authorization; he must respect the form of the bond as regularly issued. Any one who offers to the public business ventures in authorized lottery bonds organizes a lottery in the sense of Article 2 of the law of 1836, if he modifies the conditions under which the issue was permitted: "To establish a lottery means not only to create a new lottery, but also to offer the possibility of taking part in a pre-existing lottery, after having modified the conditions."<sup>2</sup> Such is the principle established in France by an unbroken line of decision, formulated for the first time by the Cour de Cassation in three decisions of 1866;<sup>3</sup> and repeated in 1882;<sup>4</sup> a principle which receives the approval of the most recent writers on the subject. By virtue of this principle, it is unanimously admitted that every transaction in which these are offered to the public must have regard to the following essentials: 1st. The unity of the bond.<sup>5</sup> 2d. The nominal value of the bond and its rate of payment. 3d. The yearly income attached to the bond. 4th. The chances by lottery. 5th. The number of drawings. Any modification of the conditions just stated exposes the seller to the penalties of the law of 1836.

In the light of this principle, French writers, and in many points the courts, both civil and criminal, have been forced to examine

<sup>1</sup> The offer to the public is the essential element of the misdemeanor foreseen and published by the law of 1836. Hence we do not treat here of sales between private individuals. When the sale has not been preceded by an offer to the public, the principle of the liberty of contract covers all the clauses of the agreement, whatever be the result.

<sup>2</sup> Report of Counsellor M. Nouquier before the Criminal Chamber of the Cour de Cassation. Couttet Case, 10th February, 1866.

<sup>3</sup> Cour de Cassation, Criminal Chamber, 10th February, 24th March, and 4th May, 1866.

<sup>4</sup> *Idem*, 8th July, 1882, and many later decisions.

<sup>5</sup> By this is meant the concentration in one and the same instrument of the right to the capital, to the interest, and to the chances of lottery.

the legality of a number of transactions connected with the sale of lottery bonds, which we sum up under our four heads as follows: 1st. Sale of divided bonds. 2d. Sale of lottery bonds by instalments. 3d. Sales of lottery bonds on approval (*à option*). 4th. Sales before the prizes are drawn, with permission to the purchaser to resell the instrument after the drawing if desired.

(1) *Sale of divided bonds*.—About 1865 certain bankers conceived the plan of dividing lottery bonds and of selling separately the parts thus obtained. The division was arranged in two different ways. The first arrangement separated the chances by lottery from the right to the interest and payment of the principal, and then divided these chances in halves, fifths, tenths, twentieths, even fortieths, and fixed the price of the chances thus prepared at pleasure. The second divided the deeds into parts of a total value inferior to the sum of the parts provided for by the law of authorization, and sold these parts, each insuring a fraction of the interest, of the payment, and of the chances by lottery. Both methods were condemned under the law of 1836 by the courts appealed to by the public prosecutor.<sup>1</sup> This was in fact “forbidden lottery,” as stated by the law of 1836, since the public were invited to take part in a lottery differing from the one authorized, inasmuch as the bonds on sale differed from those stamped by the public authorities. The sentence pronounced by the courts cut short this manner of speculation in France.

(2) *Sale of lottery bonds by instalments*.—The sale by instalments is one kind of a sale on credit, and has nothing in it peculiar to the lottery bond. It is a sale where there is a stipulation that the price is to be paid in successive deposits, usually monthly, within a certain period of time. The sale by instalments is usually employed for certain objects of personal property of use or comfort, at times for articles indispensable to some classes of persons. The price to be paid is relatively high, and if paid at one time would require a great expenditure, much beyond the means of the working classes, — pianos, bicycles, sewing machines, etc.

It was about 1880 that bankers began to apply the system of sale by instalments to the transfer of lottery bonds. The experiment was crowned with immediate success. At first the legality of the process was questioned with regard to the law of 1836. The division of the price, it was said, constituted a violation of the

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<sup>1</sup> Decisions cited in notes 3 and 4 of page 393, *supra*.



essential conditions of the authorization, since it allowed a small capitalist, by spending an insignificant sum, to take part in the drawings by lot, a privilege for which the Legislative Body had imposed the necessity of a serious outlay. But this opinion is now abandoned, and it is absolutely established by the courts and by text-writers, that the sale of lottery bonds by instalments is not forbidden by law. The division made infringes no essential condition. It in no way tampers with the *value* of the bond. The *price* alone is divided, and contracting parties are always at liberty to arrange the manner of payment.

The sale of lottery bonds by instalments is never lawful unless genuine and straightforward. If this manner of sale is valid under the penal law, it is simply because it does not, *a priori*, infringe the essential conditions of the law of authorization. It is usually vitiated, however, by the insertion of certain accessory clauses which have the effect of changing the legality of the transaction. The limits of this present essay do not permit us to give a sketch of these different clauses, which have occasioned heated polemics in theoretical discussions and provoked innumerable judicial decisions. It must now suffice to say that such abuses have arisen in the course of sales of lottery bonds by instalments, that the French Parliament is considering a statement of law upon the subject, which is to appear soon, and will cover sales of this kind with a strict legal regulation, — too strict to suit many.

(3) *Sales of lottery bonds on approval (à option).* — The sale of lottery bonds on approval is a special kind of transfer which appeared in France about 1883, and which is frequently employed there, especially at Paris and Marseilles. By virtue of this sale, effected a few days before a drawing of lots takes place, the purchaser can *at his pleasure* in the five or ten days which follow the drawing either keep the bond by paying the price agreed upon, or renounce his purchase. At the same time he abandons to the seller as forfeit the small sum originally paid on the face price of the bond when the bargain was arranged. The option thus left to the buyer has given the name to the contract. Certain writers have asserted that this is a transaction falling under the prohibition of the law of 1836. This contract, they say, simply disguises the sale of the lottery chance alone, separated from the interest and repayment of the capital. We however entertain the contrary opinion. It is merely a fair and open sale of the integral title without impairment. The purchaser becomes the owner of

the instrument in the correct form under which the issue has been authorized. The sale, it is true, is affected by a subsequent condition, but it is nowhere specified that the lottery bond should not contain a clause of this nature.

(4) *Sales before the prizes are drawn, with permission for the purchaser to resell after the drawing, if desired.*—Most financial establishments, large and small, have engaged in the sale of lottery bonds under a peculiar kind of arrangement, which up to the present date has not been made the subject of judicial action or of theoretical discussion. A fortnight before each drawing these establishments offer lottery bonds for sale, agreeing to retake them from the purchaser in the five days which follow the drawing, by paying a slight reduction (usually two or five francs) on the price of the original sale. For example, in this way a bond of Panama, sold for 122 francs before the drawing of the 15th of February, 1895, could be resold by the purchaser to the seller till the 20th of February, inclusive, for 120 francs. We regard the transaction as lawful, and not punishable, although after the sale and resale of the bond the buyer is in the same position as a person who would have bought the lottery ticket for two francs, with no bond attached. The fact remains, nevertheless, that the bond which has been the subject of these different transactions is the same integral instrument which the legislative body authorized. This circumstance in itself, as we think, insures its legality.

In the other countries of Europe, as well as in France, speculation has seized on the lottery bond. It is found usually under the two following forms, as we have already noted: 1st. Dismemberment of the bond. 2d. Sale of lottery bonds by instalments.

(1) *Dismemberment of the bond.*—In *Italy*, as in *France*, it is not allowed to offer to the public unauthorized parts of bonds, or the simple chance at lottery, separated from the bond itself (Law of the 19th of July, and decree of the 21st November, 1880), and the same prohibition is found in *Sweden*. On the other hand, in *Germany*, in *Austria*, in *Hungary*, in the *Netherlands*, and in *Turkey*, the sale of parts of lottery bonds is permitted, and the sale of all or a part of the chances at lottery which are attached to the instrument is the source of a profitable business. The latter arrangement is particularly common in the German speaking countries, where it is technically called *Heuergeschäft* or *Promessengeschäft*.

(2) *Sale of lottery bonds by instalments.*—The sale of lottery



bonds by instalments is especially practised at the present time in *Belgium*, in *Austro-Hungary*, and in *Switzerland*. In *Austria*, the kinds of sale have been strictly regulated by the law of the 30th of June, 1878, and in *Hungary* by the law of the 5th of June, 1883. In *Germany* the sale of lottery bonds by instalments (*Abzahlungs-geschäft*) has been forbidden throughout the Empire by the Imperial law of the 16th of May, 1894.

#### IV.

Various and peculiar questions arise in connection with the payment of lottery bonds, and, in order to understand them, it is convenient to distinguish the two following: 1st. The payment normally effected. 2d. The payment effected before due.

(1) *Case of normal payment*. — Lottery bonds, in general, are paid gradually. The progressive liquidation is assured by periodic drawings by lot. Certain difficulties, however, occur in the practice, and we will consider some of these briefly: —

*a.* It has happened by some mistake, or for some reason other than fraud, that two or more owners of the same number have come to claim the benefit of the same lot. The party issuing the loan was forced to pay the entire amount of the lot to each of the bearers of the successful number.<sup>1</sup>

*b.* It can also happen that the number of a bond be omitted at the time of a drawing, and that the holder proves that the number of his bond has not shared in the drawing. How is it possible to set a value in money on the loss occasioned by this omission! The holder has perhaps been deprived of a prize. At all events he has lost the chance to win one. By what rules is this chance to be valued? Different ways have been proposed, and the imagination of magistrates and jurists has been exercised on this question without restraint. Though the remedy appear perhaps empirical, we suggest the following solutions. Repeat the drawings in which the number in question was omitted, or give several chances in the following drawings for the benefit of the bondholder who was the sufferer before, by inserting in the wheel several lots containing the number of the omitted bond, etc.

(2) *Case of anticipated payment*. — The payment of the bonds usually takes place at the times determined beforehand in the specifications of the loan, in such a way that all the bonds shall be

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<sup>1</sup> Cour d'Appel de Paris, 28th of May, 1853.

repaid within the limit fixed for the total payment. But the repayment does not always operate here in a normal manner. For different reasons the time may be advanced. For instance, the borrower may fail, or possibly desire to convert his loan. Let us then examine these two cases of anticipated repayment, and consider rapidly what is the right of the holder of the lottery bond in each of these hypotheses.

a. *Failure*.—Some writers in France assert that it is essential in such cases to know the beneficiaries of the lots. Consequently, it is required to proceed immediately to all of the drawings. The winners will appear in the failure for the sums that the lot would have given them, and will obtain at least a dividend on the lots due them. This solution has been justly criticised. After the failure no such proceeding should be possible as the assignment of prizes by lot. The failure arrests everything. It fixes the situation of the creditors *in statu quo*. The failure, it might be said, acts as a veritable *crystallization*. No case of inequality should arise among the creditors after the declaration of the failure.<sup>1</sup>

The future drawings could not then be arranged on the day of the failure. It would appear that in all such cases the bondholders would have the right to claim damages. By his fault the borrower fails in an obligation to be performed, which he had assumed,—his obligation to arrange drawings by lot. This obligation unexecuted sounds in damages according to common law.<sup>2</sup> On the arrangement of these damages fresh difficulties arise, which, however, we may not consider here.

b. *Conversion*.—This is a very grave question, and in France has just given rise to a notorious lawsuit still pending before the Court of Appeal.<sup>3</sup> Is it permissible for the borrower who has issued bonds to assume the right to impose on his bondholders anticipated payment in order to liquidate his debt? Most of the courts and text-writers answer in the negative. Others think that the borrower enjoys this privilege. If this solution holds, however, it must be admitted that the existence of lottery chances attached to the bonds places the borrower in a singular embarrassment. In short, certain bonds, to be determined by lot extending through a number of years, should obtain a prize. Now it is self-evident

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<sup>1</sup> Art. 445, Code de Commerce Français.

<sup>2</sup> Art. 1142 du Code Civil Français.

<sup>3</sup> *Compagnie d'Assurances generales v. Compagnie des Chemins de Fer de l'Est*, Civil Court of the Seine, 1st Chamber, 18th of July, 1895.



that without a clause to the contrary the anticipated payment should not deprive the bondholders of the chances of lottery prizes. How are these rights to be respected?

An interesting discussion arose on this point in the Municipal Council of Paris. The controversy opened in 1880 and is still pending to-day. The enormous debt which the city of Paris carries consists of lottery bonds to which is attached a profitable interest. The city wishes to pay up its debt, but does not know how to indemnify the bondholders that are to be paid for the lottery chances of which they would be deprived. To effect this several plans have been suggested. It has been proposed to pay the bondholder for his deed, but leave him his number, which would continue to take part in the promised drawings; but this would infringe the law of 1836. As has been stated, the nature of the authorized bonds must not be changed.<sup>1</sup> It has also been proposed to make all the drawings at once, but not to touch the prizes accruing to the holders favored by lot, except at the times when they would have been paid regularly, without the anticipated payment. It was then arranged that special acknowledgments should be given to the bondholders for the prizes which fell to them in order that they might have them discounted.

But all the solutions advanced are open to objections, so that even the partisan of the conversion of loans realized by the issue of bonds must, we think, become the adversary of the conversion of lottery bonds.

Most of the questions which we have passed in review are present in many countries of Europe, as in France, where they have given rise to different arrangements. We recall only the celebrated conversions of the lottery bonds of Brussels and Anvers. The conversion of the city of Brussels was specially authorized by a royal decree dated the 24th of October, 1886. The bondholders were paid the nominal amount of their bonds; the drawings by lot were made at once, and special acknowledgments were given to the winners for the prizes accruing to them, with the opportunity of having them discounted at a rate of three per cent. *Italy* also offers us the example of numerous conversions of lottery loans. At the time of the conversion of the lottery bonds of the city of Naples, all the bondholders were presented with a ticket bearing the number of their former bond, and giving the right to be represented at the normal time in the drawings of the promised prizes.

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<sup>1</sup> *Supra*, III.

## V.

We have studied now the rules of law applicable to lottery bonds in their respective countries. Bonds, however, are not alone public funds; they are besides, in a way, international commercial paper. Frequently, for example, a foreign company will open in quite another country than its own a public subscription with the intention of negotiating thereby an issue of bonds. Often, as well, bonds issued in one country circulate and are bought and sold in another country than the one in which they were authorized. In France, as in most of the countries of Europe, share lists or subscriptions relative to bonds issued by foreign loans are entirely free. It is the same with the negotiation of foreign bonds. These transactions are always more or less protected in the respective states, where the admission to the official quotation list is more or less strictly regulated. But if the principal countries of Europe are thus freely open on the whole to bonds of foreign origin, we may not say, however, that it is the same for the special bonds which we are considering, — lottery bonds, — for the issue and transfer of these are of a nature to interfere with certain rules of public order. It is then pertinent to examine here the following questions: 1st. On what conditions may lottery bonds be issued by a borrower outside of his own country? 2d. On what conditions may lottery bonds circulate in a country other than the one in which they were regularly issued, and become the subject of valid negotiation?

(1) *Issue of lottery bonds.* — We have called attention above<sup>1</sup> to the license permitted a borrower, in view of the different statutes forbidding lotteries, with regard to the issue of lottery bonds in the principal countries of Europe. There is a general tendency to recognize in the arrangements which forbid lotteries a character not only of public regulation, but also of international regulation. In consequence of this, foreign lotteries, and therefore the issue of foreign lottery bonds, are considered to be forbidden by the same laws. Moreover, most States have formulated special prohibitions in regard to foreign lotteries,<sup>2</sup> and these are universally applied to the issue of foreign lottery bonds.

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<sup>1</sup> *Supra*, II.

<sup>2</sup> *France*, law of 21st of May, 1836, Art. 4. *Germany*, Art. 286 of Penal Code, and Prussian law of 20th of July, 1885. *England*, 6 & 7 Will. IV. c. 66. *Denmark*, law of 6th of March, 1869. *United States*, sect. 2851, 3894, 3929, 4041, of the Revised Statutes. *Italy*, Decree of 5th of November, 1863. *Sweden*, law of 6th of August, 1881.



Such are the general principles which govern the matter in the absence of special provisions. But some States have regulated in express statute with great restrictions the issue of lottery bonds on their territory. In *Germany* the law of the 8th of June, 1871, forbids all issue of foreign lottery bonds throughout the Empire. The *Austrian* and *Hungarian* laws of 1889, before mentioned, which were visibly inspired by the German law, contain analogous prohibitions. In *Belgium* the law of the 30th of December, 1867, subordinates the legality of these issues to a previous sanction of the government.

(2) *Circulation*. — Foreign lottery bonds, of which the issue has been duly sanctioned in a country, circulate there, and are negotiated as bonds of the country, under the same conditions and under the same prohibitions. As to bonds from lottery loans of which the issue has not been specially authorized in a country where an authorization of this sort is indispensable, or else a prohibition of the lotteries may be assumed, the territory of the country is closed to them, and the existence of such instruments could not be revealed with impunity. The sale of these instruments is an offence against the law, and falls within the province of the penal code. The principle is almost universally admitted, and the contrary opinion has only been sustained by isolated decisions. In the United States, for example, a decision was given by the court of New York that the lotteries of Austria did not come under the articles which forbid lottery,<sup>1</sup> and an analogous decision is found in California; but the contrary has been decided by the Supreme Court of the United States.<sup>2</sup>

It is by virtue of this principle, and on the basis of the law of 1836, that decision has been rendered in France that it is forbidden to bring to the attention of the public by announcements, prospectuses, or any other means of publicity, the existence of unauthorized foreign lottery bonds. The publication of the winning numbers even is sufficient to expose the one who attempts it to the penalties of the law of 1836.<sup>3</sup> Belgian law on this last point is broader than the French, and shows that insertions in the papers indicating simply the result of passed drawings, without informing the public about the conditions for sharing in these

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<sup>1</sup> Kohn v. Koehler, 96 N. Y. Rep. 362.

<sup>2</sup> Edward H. Horner v. The United States, 147 U. S. Rep. 449.

<sup>3</sup> Cour de Cassation de France, 14th January, 1876.

drawings, and without giving information of the importance nor of the number of drawings yet to take place, do not fall under the prohibition of the law of 1851 which forbids lotteries.<sup>1</sup> Similar rules are observed, without indulgence of any kind, in the countries where, as in England, no exception to the prohibition of lotteries is made in favor of the lottery bond. It is by reason of this circumstance that in 1871 France waived the scheme considered for a moment of realizing a loan of two thousand millions in lottery bonds. England would not have been able to take part in a transaction of this kind, and this reflection was enough to dismiss the project.

Foreign lottery bonds, of which the issue has not been authorized in a country where an act of legislation is required, could not be admitted by a simple administrative measure to the official quotations of the exchanges of this country, since they could not become the object of a valid sale. This is only true for France and Belgium since 1881. Before that time the treaty of commerce concluded between France and Belgium on the 1st of May, 1861, in Article 36, stipulated for the admission to the official quotations of each of the contracting countries of certain lottery bonds issued in the other. It is interesting to note that, by reason of this proviso of the Franco-Belgian treaty, not only Belgian lottery bonds were authorized to appear in the official quotations of Paris, but also similar bonds found in exchange quotations in all the countries with which France had concluded a treaty of commerce which contained the clause "*la nation la plus favorisée.*" The arrangement of Article 36 of the treaty of 1861 not having been reproduced in the Franco-Belgian convention of the 31st of October, 1881, French and Belgian lottery bonds have been reciprocally forced to disappear from the official quotations of the other country, and the *régime* of protection established in 1861 has come to an end.

## VI.

We have limited ourselves in the course of this study to the investigation of the principles of law raised by lottery bonds, but the present work would be far from complete if we were not to remark upon the grave economic problem raised by the existence of such obligations.

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<sup>1</sup> Cour de Cassation de Belgique, 18th July, 1887.



The most elementary principles of political economy formally condemn lotteries. Are lottery bonds, then, to be condemned on the same footing with lotteries? Such is the question. The system of lottery bonds has its obstinate partisans. It counts also unyielding adversaries, and it is among the latter that we take our place.

The partisans of lottery bonds, at the head of whom in France are the celebrated economist, Michel Chevalier, and M. Paul Leroy-Beaulieu,<sup>1</sup> have several times pleaded the cause of lottery bonds. They claim that there is a great difference between lotteries and lottery loans. 1. In the lottery there are a few winning tickets only, while most of the holders of tickets lose their investment entirely. In lottery loans, however, those who do not gain a prize may always rely on the return of their investment. 2. The lottery ticket brings no interest. The lottery bond is a deed of investment, to which a reasonable interest is attached. 3. The fascination of the lottery chances which are attached to the bonds permits the borrower to obtain a diminution in the demands of the investors for the rate of annual interest. The lottery bond, they continue, far from being detrimental, is sovereignly useful to society, for it renders saving attractive. Far from destroying the practice, which lotteries do, the lottery loan stimulates it. Many small fortunes have for an origin the charm exercised by a prize. When a man has once conceived a liking for transferable securities in this form, he quickly becomes used to all. He has taken a first step in the way of saving, and soon makes other investments. The lottery bond is no more reprehensible, no more immoral, than a hundred other ways of becoming rich which are considered lawful and legitimate. The lottery bond is for our city population what the bit of ground is for the peasant, — saving rendered attractive not only to the reason, but also to the imagination.<sup>2</sup>

Economists do not always advocate lottery bonds without reservation in their approval of the system. They blame it specially for paying a low interest, sensibly inferior to that of other steady securities; for charming small capitals too easily, which could find equally sure investment with higher interest elsewhere for the same capital, and for favoring speculation. Hence they

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<sup>1</sup> Leroy-Beaulieu, *Traité de la Science des Finances*, 5th ed., Paris, 1891, Book II. pp. 341 *et seq.*

<sup>2</sup> *Ibid.*

are not in favor of absolute freedom in issuing lottery bonds, and recommend certain restrictions on this freedom from a legislative standpoint. M. Leroy-Beaulieu proposes to regulate the issue of lottery bonds in the following manner: 1. The lowest interest should never fall below  $2\frac{1}{2}\%$ . 2. The yearly instalment for the use of prizes should not exceed the tenth of the sum needed as yearly allowance for the use of the loan. 3. The length of the period of gradual payment should not exceed seventy-five years. 4. A single prize should not exceed 150,000 francs. 5. The number of yearly drawings should be four at the most.

The reasoning of the adversaries of lottery loans is very simple. All that is immoral is anti-economic. Now, the essential immorality of the lottery is found in the lottery loan. The phase of the lottery which is so strongly condemned is the possibility of gain without work, which dazzles the eyes of the poor and needy. For the same reason lottery bonds should be condemned.

The lottery, moreover, is so profoundly immoral, that it vitiates all that it touches. The ideal system of lottery bonds, a serious investment with reasonable interest, is already far exceeded. The example has been set by public authority; the lottery in a way is to be reborn into France when the lottery ticket is disguised under the flimsy name of lottery check (*bon-à-lots*). This is an intermediate bastard between the lottery bond and the lottery ticket. It is in principle a lottery bond, which bears no interest, of a price varying from 25 centimes to 100 francs, and it is to be paid up at the close of a certain period of time. There have been several issues of these for several years past. The combination of *bon-à-lots* is condemned by the best minds. The money invested by the purchaser of a *bon-à-lots* may be considered as lost to him for the time, since it bears no interest.

Lottery bonds, even though they bear an appreciable interest, may still be always condemned from another point of view. They give rise to speculations economically reprehensible, such as we have studied above,<sup>1</sup> and which no restrictive law can effectively repress; whatever exertions are made, as long as lottery bonds exist, whatever the price may be, speculation will always arise which by clever arrangement will manage to place within the reach of modest means the possibility of taking part in the lottery at a small figure.

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<sup>1</sup> *Supra*, III.



It is for these reasons that we join the eminent economists who agree in condemning in the name of morality, and of the healthy principles embodied in political economy, the system of lottery bonds. As early as August, 1864, the Congress of economists at Hanover embraced lotteries and lottery bonds in a sweeping censure, and the masters of financial science in Germany, the Rau, the Lorenz von Stein, have echoed this censure. "The search for fortune by another road than that of work is an unwholesome excitation," have written certain of our teachers.<sup>1</sup> Ourselves, we could demand nothing better wherewith to conclude this essay than to recall in closing the celebrated saying of Franklin, whom the adversaries of lottery bonds do not fail to quote in all their discourses and in all their writings:—

"If any man tell you that you can attain riches by any other means than by hard work and economy, suspect him; he is a poisoner."

Henri Lévy-Ullmann,

Docteur en Droit, Avocat à la Cour d'Appel de Paris.

#### REMARKS.

(1) *Bibliography.* Those interested in the subject will find the matter more fully discussed in the *Traité des Obligations à Primes et à Lots*, by M. H. Lévy-Ullmann, Paris, 1895, and see also the bibliography at the end of this volume.

(2) In the preceding article no mention has been made of a certain category of bond called "Obligations à prime," or premium bonds, (bonds payable in one price, which is higher than the selling price,) which give rise to legal complications similar to those which we have just investigated, although the questions occur in somewhat different terms.

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<sup>1</sup> Cauwès, Cours d'Économie Politique, Paris, 3d ed., 1893, Book IV. No. 1311.

THE RECOGNITION OF CUBAN  
BELLIGERENCY.

THE United States is asked to recognize the Cuban insurgents as belligerents. To do this is a serious step, involving grave international consequences; such a step must not be taken as a mere holiday pastime, in gayety of heart at the appearance of a new popular uprising; if it is to be taken, it must be with the utmost care, and with a knowledge of its legal bearings and of its consequences. I propose in this paper to state the considerations, legal and otherwise, which govern the recognition of belligerency in every case; and afterwards to apply the principles thus stated to the case of Cuba.

It is necessary at the outset to distinguish three similar things: intervention, recognition of independence, and recognition of belligerency. Intervention is an actual interference in the affairs of a friendly nation, sometimes thought to be justifiable, but not usually consistent with our national policy of neutrality. Recognition of independence is the reception of a new nation into the family of nations, on the ground that it has in fact established itself as a separate and independent political body. Recognition of belligerency does not admit the belligerent into the family of nations, or even acknowledge its actual existence as a state, but only that it claims to be a state and is *de facto* making war as such. In our Revolution, France intervened, taking part in the war between us and England. We recognized the independence of the South American republics after they had conclusively proved their separation in fact from Spain. England and France recognized the belligerency of the Confederate States, but steadily refused to recognize or deal with them as an independent nation.<sup>1</sup>

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<sup>1</sup> A fourth thing, insurgency (distinguished from belligerency), is not usually recognized by writers on international law; but it seems to be a possible thing. In case of an insurrection there may be actual hostilities, but no belligerency, because there is no political organization on the part of the insurgents; or belligerency may in fact exist, but a state may not wish or need to recognize it. It may nevertheless be necessary to recognize the existence of hostilities, either to avoid dealing with an insurgent as a pirate, or to warn citizens against taking part in the contest. Such a recognition is of insurgency, not of belligerency. The distinction was first expressly pointed out (though not by any means first made) by President Cleveland in his first annual message (see 33 Alb. L. J. 125), and again in his seventh annual message of 1895.



Intervention in Cuba would mean taking part in the contest there on one side or the other; recognition of Cuban independence would mean recognition of her separation from Spain as an accomplished fact. The latter course is impossible; no one advocates the former. Recognition of the belligerency of the insurgents is the only course urged.

The right to recognize belligerency rests upon two circumstances: the existence in fact of what in international law is regarded as legal war, and the necessity on the part of the nation which acts, of recognizing the existence of that fact.<sup>1</sup>

War, in law, is not a mere contest of physical force, on however large a scale. It must be an armed struggle, carried on between two political bodies, each of which exercises *de facto* authority over persons within a determinate territory, and commands an army which is prepared to observe the ordinary laws of war.<sup>2</sup> It requires, then, on the part of insurgents an organization purporting to have the characteristics of a state, though not yet recognized as such. The armed insurgents must act under the direction of this organized civil authority. An organized army is not enough. And all this, of course, must take place within the territorial limits recognized by foreign States as part of the parent country.<sup>3</sup>

When once we realize that belligerency is a fact, we can see the extreme difficulty of determining the fact. It is a question of the state of internal affairs in another nation. We have, as a nation, no regular way of knowing what takes place in a foreign country except through our Ambassador or Minister there. But the Ambassador's relations are with the parent government, which seldom acknowledges the belligerent status of insurgents; and he lives in the capital, which is usually far from the seat of war. Information from our consuls in the insurgent territory cannot be regarded as trustworthy, for they are appointed as mere business

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<sup>1</sup> Dana's Wheaton, note 15; Calvo, *Droit Intern.*, 4th ed., vol. i. p. 238; Hall, *Intern. Law*, 3d ed., p. 31; Walker's *Science of Intern. Law*, p. 115.

<sup>2</sup> This definition is taken, with a little change, from Walker, *loc. cit.* See also Dana's Wheaton.

<sup>3</sup> The reason for this requirement is plain. We must have some political organization responsible for what takes place in all the territory of the civilized world. By recognizing the belligerency of insurgents, we free the parent country from all responsibility for what takes place within the insurgent lines (Dana's Wheaton, note 15, p. 35). The insurgents, therefore, must have an organization in that territory which can be held responsible for injury. Belligerents, in the legal sense, not only fight, they fight as a state fights, claiming to be a state, and expecting, if successful, to be recognized as such.

agents, not as vehicles of information on the affairs of state. Such information as may be gathered by newspaper correspondents is of course not such as the government may rely on. Trustworthy information sometimes comes from the government itself which is attacked. This happened (in cases about to be examined), where Colombia informed us of an insurrection in her territory, and requested us to treat the insurgents as pirates; and where our Minister informed Belgium of our rebellion, and requested the issuance of a proclamation against privateering. Our knowledge of the insurrection may be obtained from an invasion of our soil by the parties, as happened in the Canadian insurrection of 1837. If these means of information fail, the only safe course would seem to be that usually pursued by our government when a new state or government claims recognition as such, and the claim is disputed; that is, a special commission should be sent to investigate and report upon the facts. Until information of the nature of the contest is obtained by our government in some such way, it is both undignified and unsafe to attempt to determine the state of facts in a foreign country.

Supposing the existence of belligerency to have become known as a fact, the necessity of formally recognizing that fact remains to be shown. "To precipitate recognition must be regarded as an inimical act towards the original state government."<sup>1</sup> This necessity also is a matter of fact, and one the decision of which is a political, not a judicial question, but a question of the greatest delicacy, which ought to be determined only after a careful study of the precedents, both American and European. Let us therefore examine historical instances of the recognition of belligerency.

The first occasion for action on the part of the United States in the case of a war for independence occurred when the South American colonies of Spain revolted, early in the century. The first province to revolt was Buenos Ayres, which began hostilities in 1810, though the actual declaration of independence did not occur till 1816. On September 1, 1815, President Madison issued the following proclamation.<sup>2</sup>

"Whereas information has been received that sundry persons, citizens of the United States, . . . are conspiring together to begin or set on foot . . . a military expedition or enterprise against the dominions of Spain,

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<sup>1</sup> Walker's Science, p. 117.

<sup>2</sup> Amer. State Papers, For. Relations, vol. iv. p. 1.



with which the United States are happily at peace: . . . I have therefore thought fit to issue this my proclamation, warning and enjoining all faithful citizens . . . to withdraw from the same without delay."

It will be noticed that in this proclamation the President refrained from the recital of a revolt in the Spanish provinces. The first official notice of the civil war seems to have occurred in the message of President Monroe to Congress, November 17, 1818.<sup>1</sup> This appears to have been relied on by the courts of the United States as a recognition by the executive of the belligerency of Spanish America.<sup>2</sup> The President simply stated that "the civil war which has so long prevailed between Spain and the provinces in South America, still continues without any prospect of its speedy termination."

When Texas revolted from Mexico, its belligerency seems in the same way to have been assumed, but never to have been recognized in any formal manner. The first public notice taken of this rebellion seems to have been connected with the recognition of her independence.<sup>3</sup>

Only once, apparently, has a President by his proclamation called the attention of the country to a foreign insurrection: this was in the case of the Canadian revolt of 1837.

An insurrectionary movement was made in Upper Canada with a view to reforming the government. The insurgents formed a provisional government, with one Mackenzie as chairman *pro tem*. Navy Island, in the Canadian portion of the Niagara River, was occupied, and a proclamation issued from there calling for aid in revolutionizing the province. One Van Rensselaer, an American citizen, was given command of the forces. The steamboat *Caroline*, owned by an American citizen, was said to be helping the insurgents. Under orders from the British commander, a party crossed the river, took possession of the *Caroline* within the territory of New York, drove off her crew, destroyed her, and returned to Canada.<sup>4</sup>

<sup>1</sup> 4 Wheat. App. 23.

<sup>2</sup> The *Divina Pastora*, 4 Wheat. 52 (1819).

<sup>3</sup> Congress passed a resolution looking toward recognition of the independence of Texas, June 18, 1836; the President then communicated to Congress such information as he had (24 Br. & For. St. Pap. 1267), and appointed a Commissioner to investigate, whose reports were transmitted to Congress a few months later (25 *id.* 1352), with a message advising that recognition of independence be delayed. Recognition of belligerency seems never to have been desired.

<sup>4</sup> For this statement I am principally indebted to Dr. Snow, Cas. and Op. on Intern. Law, p. 177.

This occurred on December 29, 1837; a week later, on January 5, 1838, President Van Buren issued this proclamation: —

"Whereas information having been received of a dangerous excitement on the northern frontier of the United States, in consequence of the civil war begun in Canada; . . . that arms and munitions of war and other supplies have been procured by the insurgents in the United States; that a military force, consisting in part, at least, of citizens of the United States, had been actually organized, had congregated at Navy Island, and were still in arms under the command of a citizen of the United States, and that they were constantly receiving accessions and aid:

"Now therefore . . . I, Martin Van Buren, do most earnestly exhort all citizens of the United States who have thus violated their duties, to return peaceably to their respective homes; and I hereby warn them that any persons who shall compromit the neutrality of this government by interfering in an unlawful manner with the affairs of the neighboring British provinces, will render themselves liable to arrest and punishment."<sup>1</sup>

The Governors of the States of New York and Vermont had previously issued similar proclamations; and finally the President issued a second proclamation reiterating the warnings of the first, on November 21, 1838.<sup>2</sup>

No formal action was taken, nor was there even an informal recognition of belligerency in the case of several revolts in which the people of the United States took an intense and friendly interest, though they may for a time have seemed sure to succeed. Such revolts were those of Greece, Hungary, Sicily, Poland, and Cuba. In several cases inquiry was made as to the probability of success: in the cases of Spanish America and of Hungary, commissioners were sent by the President to investigate the state of affairs; but this was with a view to recognizing independence, if it existed. Secretary Cass was quite justified in writing to the Peruvian Minister in 1858, —

"By what public act, whether proclamation or otherwise, this recognition [of belligerency] must take place I have not found laid down. I am not aware that, in this country, any solemn proceeding, either legislative or executive, has been adopted for the purpose of declaring the status of an insurrectionary movement abroad, and whether it is entitled to the attributes of a civil war; unless, indeed, in the formal recognition of a portion of an empire seeking to establish its independence, which in fact does not so much admit its existence as it announces its result, at

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<sup>1</sup> 38 Br. & For. St. Pap. 1074.

<sup>2</sup> 26 Br. & For. St. Pap. 1324.



least as far as regards the nation thus proclaiming its decision. But that is the case of the admission of a new member into the family of nations."<sup>1</sup>

In 1885 it became necessary for the United States to declare its position with regard to insurgents in the United States of Colombia. The government of that country asked us to declare public vessels of the insurgents piratical. Secretary Bayard declined to do so; and President Cleveland, in his Message of December 8, 1885, said that the request could not be granted consistently with the principles of international law. "The denial by this government of the Colombian propositions," he added, "did not however imply the admission of a belligerent status on the part of the insurgents."<sup>2</sup>

The action of the United States may be summed up as follows: She has taken formal action to recognize a state of civil war only when a hostile expedition has entered her own territory, so that knowledge of belligerency was obtained within her own borders. She has informally recognized such belligerency only when it was in adjoining territory, or when it was forced upon her by contact with ships of war of insurgents; and she has even in that case acted with great moderation. Her attitude as to recognition of the Confederate States as belligerents will be examined later.

The first British proclamation of neutrality in case of civil war followed soon after Madison's, and upon the same occasion; but in it the existence of civil war was recognized.

"Whereas there unhappily subsists a state of warfare between His Catholic Majesty, and divers provinces or parts of provinces in Spanish America," all British subjects were warned not to enter the army or navy of such provinces, or of His Catholic Majesty; such subjects of Great Britain as had already been allowed to enter the service of the King of Spain were however allowed to remain in it, on condition of not serving against the revolted provinces.<sup>3</sup>

The next proclamation of neutrality in case of a civil war was

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<sup>1</sup> 50 Br. & For. St. Pap. 1152.

<sup>2</sup> An insurgent vessel having been captured and brought into a District Court of the United States as a pirate, Judge Brown held that she was a pirate by the law of nations; but that the executive action had recognized the insurgents as belligerents. *The Ambrose Light*, 25 Fed. 408. These assertions, thus directly opposed to the opinion of the executive department, were vigorously combated in an article by Francis Wharton, then Solicitor for the Department of State, 33 Alb. L. J. 125.

<sup>3</sup> 4 Br. & For. St. Pap. 488 (Nov. 27, 1817).

drawn out by the frequent enlistments of British subjects in the Greek revolution. The date of the proclamation was September 30, 1825, four years after the declaration of independence by Greece.

"Whereas the Ottoman Porte, a power at peace with His Majesty, is and has been for some years past engaged in a contest with the Greeks, in which contest His Majesty has observed a strict and impartial neutrality," and now certain British subjects were threatening to enlist under the Greek flag, they were warned not to take service with either party.<sup>1</sup>

The Turkish government remonstrated on the ground that —

"The British government allowed to the Greeks a belligerent character, and observed that it appeared to forget that to subjects in rebellion no national character could properly belong. But the British government informed Mr. Stratford Canning that 'the character of belligerency was not so much a principle as a fact; that a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be treated as a belligerent, and even if their title were questionable, rendered it the interest well understood of all civilized nations so to treat them; for what was the alternative? A power or a community (call it which you will) which was at war with another, and which covered the sea with its cruisers, must either be acknowledged as a belligerent or dealt with as a pirate;' which latter character as applied to the Greeks was loudly disclaimed."<sup>2</sup>

The next recognition by Great Britain of a foreign civil war was on May 13, 1861, when the Confederate States were recognized as belligerents.

"Whereas hostilities have unhappily commenced between the government of the United States of America and certain States styling themselves the Confederate States of America, and whereas we . . . have declared our royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties," all subjects of the Queen were warned to observe a strict neutrality, and not to enter the service of either party, and to respect a blockade lawfully established by either party of the ports of the other.<sup>3</sup>

<sup>1</sup> 12 Br. & For. St. Pap. 525.

<sup>2</sup> Quoted in Lord Russell's speech, May 6, 1861, Hansard, vol. 162, p. 1566. I find it in Bemis, *Rebel Belligerency*, p. 6.

<sup>3</sup> 51 Br. & For. St. Pap. 165.

This proclamation at once aroused a vigorous protest in the United States. The ground formerly taken by the Porte, that a foreign country had no legal right to recognize a rebel as belligerent, was not adverted to; objection was made to the haste of the proclamation, and to certain of its phrases, which were thought to put the parties on a gratuitous and offensive equality.<sup>1</sup>

Mr. Adams, then Minister of the United States, near the Queen, took the former ground only. He characterized the Queen's proclamation as "unprecedented and precipitate."

"He contrasted it with the long period which elapsed between the beginning of the Greek insurrection and our admission of the belligerent character of Greece. I said that the population of the seceding States, amounting to many millions, made them of greater importance than Greece in the early days of her independence, and the critical position of our commerce made it necessary to take some step."<sup>2</sup>

Mr. Adams laid down this rule:<sup>3</sup>—

"Whenever an insurrection against the established government of a country takes place, the duty of governments, under obligations to maintain peace and friendship with it, appears to be, at first, to abstain carefully from any step that may have the smallest influence in affecting the result. Whenever facts occur of which it is necessary to take notice, either because they involve a necessity of protecting personal interests at home, or avoiding an implication in the struggle, then it appears to be just and right to provide for the emergency by specific measures, precisely to the extent that may be required, but no farther. It is, then, facts alone, and not appearances or presumptions, that justify action. But even these are not to be dealt with farther than the occasion demands; a rigid neutrality in whatever may be done is of course understood. If, after the lapse of a reasonable period, there be little prospect of a termination of the struggle, especially if this be carried on upon the ocean, a recognition of the parties as belligerents appears to be justifiable; and at that time, so far as I can ascertain, such a step has never in fact been objected to."

Lord Russell assented to this statement of principle, and contended that a necessity had arisen for England to act.<sup>4</sup>

<sup>1</sup> Bemis, *Rebel Belligerency*, pp. 8 and 9, and *passim*.

<sup>2</sup> Lord John Russell to Lord Lyons, May 21, 1861; 51 Br. & For. St. Pap. 193.

<sup>3</sup> Dana's *Wheaton*, note 15, p. 37.

<sup>4</sup> "Le précédent historique, que nous venons d'emprunter à deux puissances de premier ordre, résout pratiquement de la manière la plus précise et la plus satisfaisante la question de la déclaration et de la reconnaissance du titre de belligérant." Calvo, *Droit International*, 4th ed., vol. i. p. 239.



The same complaint was made against France, upon her recognition of the Confederate States as belligerent a few weeks later; but no further act of France which seemed unfriendly followed, and all bitterness of feeling against it soon disappeared.<sup>1</sup>

In curious contrast to the feeling in this country against England and France was that against Russia, though except in form she went as far as those countries. This is clear from an account by Mr. Appleton, our Minister near the Czar, of an interview with Prince Gortchacow.<sup>2</sup> The Prince said:—

“There was no blockade of southern ports, and any informality in the papers of ships which cleared there would be overlooked. This, he said, was the course determined on by England and France, and he understood it was pursued also by our own government. I told him . . . that American ships ought to carry the American flag, and be provided with American papers; and if this was not done, or, still more, if the American character was repudiated, I hardly saw how they could be recognized as American ships. He said there were some difficulties certainly in the way; but it was better to overlook them, and to receive the ships for just what they were, vessels belonging to the United States, but not provided, in consequence of existing troubles, with the usual evidence of nationality. I said they might deny that they belonged to the United States. He replied that this would not alter the fact. They came from ports in the United States, and the separation of the Confederate States was not yet recognized. The policy, he said, involved no recognition of nationality, but was only a concession in aid of commerce. I replied that my only interest was to prevent this recognition. We desire to be permitted to work out the pending questions in the Union in our own way.”

In accordance with this policy were the following instructions to the Commander in Chief of the Port of Cronstadt.<sup>3</sup>

“The flag of men-of-war belonging to the seceded States must not be saluted. That there may be no obstacle in the way of commerce, merchant vessels of the seceded States are to be treated according to the rules acted on by us with regard to Italian merchant vessels sailing under the Italian flag,<sup>4</sup> *i. e.* according to the treaties that are at present in force. . . . Should the crews of vessels belonging to the seceded States not wish to acknowledge the authority of the Consuls appointed by the Federal Government of Washington, then in case of dispute they

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<sup>1</sup> 51 Br. & For. St. Pap. 1137 (June 10, 1861).

<sup>2</sup> 51 Br. & For. St. Pap. 99.

<sup>3</sup> 51 Br. & For. St. Pap. 100.

<sup>4</sup> The new Kingdom of Italy was not yet recognized.

must abide by the decision of our local authorities, in the same manner as foreigners whose governments have no representatives in our empire."

The other nations of Western Europe also took action in the matter. The action of Spain, while "less objectionable than some other documents which have seen the light in Europe,"<sup>1</sup> was not liked in the United States. It recognized a "contest begun between the Federal States of the Union and the States confederated at the South." Portugal, while declining to accept certain suggestions of the American Minister, issued a proclamation on the whole acceptable. Our Minister "notified M. d'Avila that a proclamation or declaration which, in doubtful phrases or by implication, recognized the existence of any pretended organization in the United States independent of the government which accredited me, and which alone has power to make treaties and conduct diplomatic intercourse, would be regarded as a most unfriendly act by the President;" and the proclamation did not, in fact, recognize such government.<sup>2</sup>

The northern nations were more friendly. The Prussian proclamation was issued by the Minister of Commerce at the desire, if not in accordance with the request, of our Minister, who wrote, after its issue, that while not what he had expected, as it was not in the King's name, it would doubtless have the desired effect.<sup>3</sup> It recited "the conflict that has broken out among the North American States."<sup>4</sup> Holland, in a similar proclamation, recited "the existing disturbances in the United States of America," "the contest which seems to be in existence in the United States of North America."<sup>5</sup> Belgium was asked by our Minister to issue a proclamation against enlistment and privateering. Her Minister said that the matter had been considered, but the proclamations of England and France had not seemed to satisfy us. Our Minister replied, —

"That he was correct in his views of our sentiments as to the course which England and France had seen fit to pursue. We could not look upon the recognition of belligerent rights to those who, under our laws, were rebels, and before we had attempted to employ forcible means of coercion, as evincing the friendly spirit we had a right to expect; that these people would be treated none the less as rebels on the land, as

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<sup>1</sup> 51 Br. & For. St. Pap. 97.

<sup>4</sup> *Ib.* 70.

<sup>2</sup> 51 Br. & For. St. Pap. 123.

<sup>5</sup> 51 Br. & For. St. Pap. 117.

<sup>3</sup> 51 Br. & For. St. Pap. 66, 67.

pirates on the seas, — they or those, of whatever nationality, who joined them; and we counted, on the part of Belgium, upon no such qualification of our citizens in rebellion, whom we were engaged in submitting to the action of our laws."

Belgium issued a proclamation similar to that of Prussia, and was thanked for it by our Minister.<sup>1</sup>

The points chiefly insisted upon by the government of the United States at this time seem to have been these: —

First, there should be no haste in recognizing belligerency.

Second, recognition should not be given in such a way as to influence the result of the contest.

Third, recognition should go no further than the immediate occasion required.

The course of the United States, as we have examined it, is entirely consistent with these contentions.

In the first place, we have not recognized belligerency prematurely. We never recognized the belligerency of Greece, because the civil war in that country did not inconvenience us at all, or call for our interference. We recognized civil war in Canada when our own soil was invaded; and we recognized the belligerency of Spanish America, eight years after it was a fact, when our ocean commerce became involved in the contest, which was largely naval.

In the second place, our recognition has not been given in such a way as to affect the result of the contest. The policy of allowing other people, even those of this continent, to settle their constitutions for themselves has been adhered to by the United States, no matter how great our interest in the result of the decision. We have constantly refused to take measures for securing the prevalence of our own ideas of government, even in those parts of America nearest to us. As President Grant said, at the time of the Cuban insurrection of 1869, "The United States have no disposition to interfere with the existing relations of Spain to her colonial possessions on this continent."<sup>2</sup>

Third, our recognition has gone no further than the immediate occasion required. One of the most offensive parts of the Queen's

<sup>1</sup> 51 Br. & For. St. Pap. 76, 77.

<sup>2</sup> Message of 1869, Wharton's Dig. of Intern. Law, vol. i. p. 383. See to the same effect Secretary Van Buren (1829), *ib.* p. 175; President Jackson (1836), 24th Cong. 2d Sess., Sen. Doc. No. 20; Secretary Webster (1842), Whart. Dig., vol. i. p. 177; Secretary Everett (1852), *ib.* p. 379; Secretary Seward (1864), *ib.* p. 184.



proclamation at the time of our Civil War was the warning not to break any blockade lawfully established "by or on behalf of either of the said contending parties." The care with which this rule has usually been observed is evident. In Madison's proclamation, already referred to, it was necessary only to forbid hostile expeditions "against the dominions of Spain." This served every legitimate purpose, and gave no offence to Spain. When Colombia requested that the insurgent vessels be held pirates, the United States refused the request, but expressly declared that it was not a general recognition of the insurgent forces as belligerents.

In applying the foregoing principles to the actual case we meet with all the embarrassment that has already been pointed out. As to the fact of belligerency, we know nothing with sufficient certainty to justify action. We know from common report that fighting is being done, and that the avowed purpose of one party is to free Cuba from the control of Spain. But whether a civil government has been constituted which controls the military operations who can say? By recognizing belligerency we free Spain from responsibility for wrongs done by the belligerents: to what organization can we look in place of Spain? Where is its capital? Who is its Minister of Foreign Affairs? What are its actual territorial boundaries? At what point in Cuba shall we cease to be within the control of Spain, and come within the power of another *de facto* government? These questions may be answerable; we cannot truthfully say that the insurgents are belligerents unless we know that they are answerable, and that we may, at least upon occasion, discover the answers. Still further, can we be sure that they are observing the rules of civilized war? We have no information on this subject except from Dame Rumor, and she says one thing to-day, and another to-morrow. Unless we are certain on this point, we must withhold recognition.

We are not yet sure, therefore, of two facts which are essential to legal belligerency; and, until we are assured, we cannot candidly say, There is a civil war between Spain and the Province of Cuba. But suppose those facts to be satisfactorily established, how far is it necessary for us to take notice of the war?

The ordinary occasion for the recognition of belligerency — hostilities upon the sea — is here absent. The insurgents, so far as we know, possess no seaports; they certainly have no navy; we have no notice of any blockade. Nor is there any danger of invasion of this country by either party. The only occasion for action

on the part of the United States would seem to be the restraint of our own citizens from breaches of our neutrality laws. For the purpose of warning our citizens against such breaches a proclamation like that of President Madison would seem sufficient: "Whereas information has been received that sundry persons, citizens of the United States, are conspiring together to set on foot a military expedition against the dominions of Spain, with which the United States are happily at peace, I have thought fit to issue this my proclamation." If this is enough for the purpose, anything more would be a gratuitous insult to Spain, contrary to our traditions, and opposed to the principles which we insisted upon in our own time of trouble. This is not in any legal sense a recognition of belligerency.

My conclusion is confirmed by the action of this government at the time of the last Cuban revolt, twenty-five years ago. That insurrection lasted ten years, and was apparently more widespread and nearer to success than the present one; but President Grant constantly refused to recognize the insurgents as belligerents.

In 1875, eight years after hostilities began, and six years after he had first referred to the insurrection in his annual message, Grant, after defining belligerency and stating when its existence should be recognized, in similar terms to those used above, continued: —

"I fail to find in the insurrection the existence of such a substantial political organization, real, palpable, and manifest to the world, having the forms and capable of the ordinary functions of government toward its own people and to other States, with courts for the administration of justice, with a local habitation, possessing such organization of force, such material, such occupation of territory, as to take the contest out of the category of a mere rebellious insurrection, or occasional skirmishes, and place it on the terrible footing of war, to which a recognition of belligerency would aim to elevate it. The contest, moreover, is solely on land; the insurrection has not possessed itself of a single seaport whence it may send forth its flag, nor has it any means of communication with foreign powers except through the military lines of its adversaries. No apprehension of any of those sudden and difficult complications which a war upon the ocean is apt to precipitate upon the vessels, both commercial and national, and upon the consular officers of other powers, calls for the definition of their relations to the parties to the contest. Considered as a question of expediency, I regard the accordance of belligerent rights still to be as unwise and premature, as I regard it to be, at present, indefensible as a measure of right."<sup>1</sup>

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<sup>1</sup> Seventh Annual Message, 1875; 1 Whart. Dig. Int. Law, 406.

That this language accurately describes the present situation we must believe from all trustworthy evidence as to the nature of the struggle that has reached us. It is our evident duty to observe strict neutrality, and to take no step which would give the insurgents an international status, and thus hold out to them delusive and fatal hopes. It is reassuring to see that in his annual Message the President has acted with care and moderation, and in accordance with the requirements of law.

*Joseph H. Beale, Jr.*



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THE LAW SCHOOL. — Several unexpected changes in the conduct of courses in the School have been necessitated by the ill health of Professor Williston. By the advice of his physician, Professor Williston will remain away for the remainder of the School year. His absence is much to be regretted, for by the thorough character of his work and his geniality of manner he has won the high regard of both the Faculty and the students. Of the courses which he conducted, Professor Ames has taken Bills and Notes for the remainder of the year, and First Year Contracts temporarily. The latter course is to be turned over on the 1st of February to Mr. George Rublee of last year's graduating class. Professor Beale has taken charge of Civil Procedure. With Mr. Rublee's coming, Professor Ames will reassume charge of Suretyship, which Professor Langdell has conducted in his stead since Professor Williston's absence.

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LORD BLACKBURN. — The greatest English common law judge of recent years, died on January 8, at his country place in Ayrshire, Scotland. He resigned his office as one of the Lords of Appeal in Ordinary in 1888, and it has been understood that his health has since been gradually failing. He was a Scotchman, born in 1813, educated at Eton, and at Trinity College, Cambridge, where he was eighth wrangler in 1835. In 1838 he received the degree of M. A., and in the same year was called to the bar at the Inner Temple, and joined the Northern Circuit. In 1845 he published his admirable little treatise on "The Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares, and Merchandize." This is almost a model text-book; it has had a great influence in shaping the law, and it forms the basis of Benjamin's book, in those parts of the subject which it covers. Lord Blackburn said of this little book in 1883, in a private letter, that it "was written when I had literally nothing else to do, as I had then no business at all. I took great pains with it, more as a means of teaching myself than with any hope of making a valuable book: but now, after considerable experience, I am pleased to find how little I should alter,

if I were to write the book afresh." A second edition was published in 1885, edited by J. C. Graham. From Michaelmas, 1852, to Trinity, 1858, in the eight volumes of Ellis & Blackburn, and the one volume of Ellis, Blackburn, & Ellis, Blackburn was one of the reporters to the Queen's Bench.

In speaking of his appointment to the bench in 1859, Foss says of him, in his Biographical Dictionary, with a tempered approbation which sounds oddly now: "Though with no considerable business as a counsel, he was esteemed a sound lawyer, and after twenty years' experience at the bar he was appointed a judge of the Queen's Bench in June, 1859, and received the customary knighthood."

He had never "taken silk," and it was a strange departure from precedent to appoint a man to be a judge who had not been Queen's Counsel; it created a great stir. It was Lord Campbell who did this. Campbell had become Chancellor on June 18, 1859, and as early as July 3 we find in his diary the following entry: "I have already got into great disgrace by disposing of my judicial patronage on the principle of *detur digniori*. Having occasion for a new judge to succeed Erle, made Chief Justice of the Common Pleas, I appointed Blackburn, the fittest man in Westminster Hall, although wearing a stuff gown; whereas several Whig Queen's Counsel M. P.s were considering which of them would be the man, not dreaming that they could all be passed over. They got me well abused in the Times and other newspapers, but Lyndhurst has defended me gallantly in the House of Lords."

Campbell, a Scotchman himself, and Chief Justice of the Queen's Bench from 1850 to 1859, had had Blackburn for his reporter for six of these years, and he knew his man. The wisdom of the appointment was soon abundantly shown. Blackburn's judicial opinions rank among the very best of his time. His later promotion, in 1876, to be one of the Lords of Appeal in Ordinary, was handsomely earned; and when he retired, about eight years ago, he had not his peer upon the English bench. Strong men remain there, but one hardly knows yet where to turn for that combination of sound thinking, exact and instructive discrimination, and large, rational, and just exposition by which the law of all English-speaking countries has profited for these many years.

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A RECORD OF THE COMMEMORATIVE EXERCISES OF LAST JUNE.—The Harvard Law School Association has just published, in pamphlet form, an account of the exercises of June 25 last. These exercises, it will be remembered, marked the ninth annual meeting of the Association, and, more particularly, the twenty-fifth anniversary of Professor Langdell's appointment as Dean of the School. The notable gathering on that occasion was in his especial honor. The well known portrait of Professor Langdell, painted by F. P. Vinton, Esq., and reproduced in the HARVARD LAW REVIEW for March, 1893, is here excellently reproduced as the frontispiece of the pamphlet. Then follow, in full, Sir Frederick Pollock's oration, delivered in Sanders Theatre, and the after-dinner addresses of the invited guests given in the Hemenway Gymnasium. The oration is too widely known to need further comment; but it may not be amiss to direct particular attention to the addresses of President Eliot and Professor Langdell, for they contain much of interest concerning the vicissitudes, the bold experiments, and finally the material and intellectual



success which have characterized the Law School within the last twenty-five years. As an example of graceful and felicitous introduction, the closing paragraph of Hon. J. C. Carter's address, introducing Professor Langdell, has been rarely surpassed.

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THE ROMAN AND THE COMMON LAW.—The address delivered by Judge William Wirt Howe, of New Orleans, before the American Bar Association last summer has recently been reprinted in pamphlet form. He outlines in a very attractive manner the several ways in which the Roman law has exercised an influence on our law, wisely saying little about Roman Britain and much about Anglo-Norman ecclesiastics. Students of Germanic legal history will perhaps find him too generous to Rome when he comes to an enumeration of some institutions and doctrines of ours which show civilian influence. The use of the fine, for instance, in conveying land, can scarcely be connected with the *in jure cessio* of the older Roman lawyers. The *in jure cessio* was a collusive suit which ended with a recovery by judgment, and not with a "fine," or compromise (*concordia finalis*). Furthermore, the Roman device did not preclude the claims of third parties. On the other hand, the use of collusive suits to convey land was known to the courts of the Frankish Empire, and the *gerichtliche Auflassung* which developed from the Frankish practice was the most important, possibly the sole, mode of conveying land in Germany during the later Middle Ages. The procedure is substantially that of the English fine, and the one whom the court puts in possession is protected after a year and a day by the court's ban. There would seem to be no reason to look beyond the Germanic systems of law for the origin of the fine. (See Pollock and Maitland, *Hist. of Eng. Law*, vol. ii., pp. 94, 95.) The same may be said of many another English practice or rule of law. The accident of resemblance, and in some cases the partially Romanized terminology of our law, have more than once led writers to give undue credit to Rome.

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REPORT OF COMMISSIONERS OF CODE REVISION IN NEW YORK.—On the 11th of December, the Commissioners appointed by Governor Morton last June to study codes of procedure in operation outside of New York, and submit propositions as to the best means of revising, condensing, and simplifying the present New York Code, reported to the Legislature the result of their six months' work. Six months has proved too short to allow a full performance of the duties imposed upon the Commission. Accordingly the Commissioners make no attempt to suggest in detail the features of the new code: nor have they found it practicable in the limited time to make a comparative study of the various State and foreign procedure codes. Such an examination of other codes and specific propositions for a revised New York Code are to be reported a year hence.

The first part of the present report deals with civil procedure in ancient countries, including in its range systems of procedure as widely separated, geographically at least, as those of ancient Ireland, Greece, Persia, and Hindustan. The second part contains a list of modern states and countries, with an enumeration in case of each, of the codes, statutes, and other sources of information regarding the procedure in



vogue. The third and last division of the report gives in outline the history of civil procedure in New York. According to the Commissioners' computation twenty-five hundred code amendments and statutes relating to practice, enacted since the organization of the State government, besides hundreds of special, local and temporary acts, represent the tortuous evolution of the present unsatisfactory code. The suggestions thrown out as to the general lines along which reform should be made, indicate an inclination on the part of the Commissioners to revise and expand the present code, rather than create a new one. The proposition, however, to extend the scope of the code so as to include as procedure "whatever requires the attention of a court in enforcing or protecting the rights of citizens"—however remote its application—cannot escape much adverse criticism. The test of inclusion is too indefinite. Simplicity and uniformity of procedure are not associated with a miscellaneous code.

The report has, on the whole, broken the ground well for the work to follow; and for this the Commissioners are deserving of praise. But the report has done little more than this, and the crucial task of revision yet remains. Despite the care which characterizes the present report, it still seems better to put the task of revision on free shoulders; not to add it to the burden of revising the General Statutes, which is already imposed upon the Commissioners.

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EXTRADITION PROCEEDINGS — WHAT LAW DETERMINES CRIMINALITY OF ACT?—If the United States demands of Canada the extradition of a fugitive from justice, must it be proved before the Canadian tribunal that the act charged is a crime according to both United States and Canadian law? If not, which law is to be considered? The Extradition Act of Canada, following the usual language of treaties, provides that a prisoner shall be surrendered only upon such evidence of criminality as would, under Canadian law, justify his committal for trial if the crime had been committed in Canada. At first glance it would appear that Canadian law should determine merely this question of the amount of evidence necessary, and that, as the crime, if any, has been committed against the laws of the United States, those laws alone should determine substantively whether or not there has been a crime. And that is the opinion expressed by Armour, J., in *Re Phipps*, 1 Ont. R. 586, 609-610, and by the majority of the court in *In the Matter of John Anderson*, 20 U. C. Q. B. 124. But such treaty or statutory provisions have generally been interpreted as providing that the laws of the surrendering country must be considered, not only on points of evidence, but also on the ultimate question of whether the act alleged constitutes one of the extradition crimes. (See *In re Windsor*, 6 B. & S. 522.) And the weight of Canadian authority is to that effect. *In re Smith*, 4 U. C. P. R. 215; Moore on Extradition, § 429, and cases cited.

The further question, as to whether the act must also be shown to be a crime according to the laws of the demanding country, was raised in the recent case of *In re Murphy*, 22 A. R. 386 (as abstracted in 31 Canada Law Journal, 594), and the Court of Appeals of Ontario was evenly divided in its answer. The language of the Extradition Act seems to be equally susceptible of either interpretation, so that the question is left to be decided on general principles. The opinion expressed by the

two judges, who held that it must be proved that the act alleged was a crime in the United States, seems clearly preferable, though accompanied by the apparently mistaken assertion that it must also be a crime of the same *name* in Canada. The chance that an act which is one of the extradition crimes under the law of the surrendering country, will not be a crime at all in the demanding country, is certainly slight. And if the criminality of the act under the former law is shown, the burden of proof may well be cast on the prisoner to show that it is not a crime according to the law of the demanding country. But if he satisfies that burden of proof, he clearly has shown himself guiltless of crime, and should go free. It is believed that this view is in accord with the weight of authority. *In re Bellencontre*, [1891] 2 Q. B. 122; *Re Phipps*, 1 Ont. R. 586; Moore on Extradition, § 429.

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WHEN WILL DECEIT LIE ON A BROKEN PROMISE?—In a recent Missouri case, *Traber v. Hicks*, 32 S. W. Rep. 1145, the defendant had contracted with the plaintiff to do a certain thing, without disclosing that a previous contract with a third party prevented performance. The plaintiff brought an action of deceit. The argument that the defendant's wrong was a mere breach of contract was dismissed by the court, and the plaintiff was allowed to recover, on the ground that there was concealment of a material fact, namely, the outstanding agreement with the third party, which it was the defendant's duty to disclose. As the other elements of deceit were present, the case was without doubt rightly decided. It suggests the query as to whether the court would have been willing to go one step further, and hold the defendant liable for deceit if he had not put it out of his power to perform, but had merely intended not to perform, at the time he made the promise.

This question has not often arisen, as generally the simpler remedy is to be obtained in an action of contract. But it becomes material in cases where, for one reason or another, it is either inexpedient or impossible to obtain redress in the latter form of action. What little authority there is on the point is in conflict. The latest treatise on torts contains an assertion to the effect that an action of deceit does not lie for failure to perform a promise, though the promisor never intended to perform, and the promisee has altered his position and suffered damage. 1 Jaggard on Torts, 583. And the view that such an act is not fraudulent has been taken by a few courts. *Fenwick v. Grimes*, 5 Cranch C. C. 439; *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162, 192. On the other hand, it is generally held that preconceived design in a buyer not to pay for the goods is such fraud as will vitiate the sale. (See the exhaustive opinion of Doe, J., in *Stewart v. Emerson*, 52 N. H. 301.) And in other cases a promise made without intent to perform, merely to induce some act on the part of the promisee, has been held fraudulent. *Dowd v. Tucker*, 41 Conn. 197; *Goodwin v. Horne*, 60 N. H. 485.

The simple question, apparently, is whether there is any misrepresentation of a present fact. As a promise relates to the future, courts have jumped at the conclusion that there is none. But a promise to do an act in the future certainly carries with it a representation of present intention to perform, just as certainly as the promise in *Traber v. Hicks*, included a representation that the promisor had not put it out of his power to perform. And that a representation of present intention is a statement of



fact has rarely been disputed since Bowen, L. J., declared, in *Edgington v. Fitzmaurice*, L. R. 29 Ch. Div. 459, that "the state of a man's mind is as much a fact as the state of his digestion." If, then, this misrepresentation of a present fact is accompanied by the other elements of deceit, it seems clear on principle that the action should be allowed. See 1 Bigelow on Fraud, 484. Whether or not it would be expedient in practice is quite another question.

**SPECIAL LEGISLATION — CLOSING BARBER SHOPS ON SUNDAY.** — The constitutionality of so called "special legislation" has again been denied in Illinois. An act to close barber shops on Sunday was reviewed by a minor court in *The People v. Eden* (28 Chicago Legal News, 110), and decided squarely on the ground that the legislature made an arbitrary discrimination against a special class. Although the court remarked upon there being a deprivation of liberty and property, it admitted at the end of the decision that, had the law applied to all kinds of business, it would have been valid. The objection was, then, not that the legislature had forbidden an occupation on Sunday, but that it had singled out a particular trade, and had not extended its prohibition to others also. It is submitted that this omission is a matter of legislative discretion, and does not furnish a proper occasion for interference by the judiciary.

The way in which American courts have come to exercise a supervision over legislation, and the limits to which such supervision is subject, have been discussed elsewhere. (Professor Thayer, in 7 HARVARD LAW REVIEW, 129. See also 9 HARVARD LAW REVIEW, 277.) It is enough to say here that the making of laws has been intrusted to the legislative branch of the government, and so long as the actions of the legislature are such that one could conceive them to have been actuated by some rational public reason, the legislature must be deemed to have acted within its province. An analogy may be found in the discretion given to a jury on matters of fact; a verdict will not be set aside so long as a reasonable man could possibly have entertained the jury's opinion.

Applying this test to the subject of special legislation, can it be said, for example, that a reasonable man could not by any possibility have seen fit to apply a Sunday closing rule to barber shops without at the same time applying it to other trades? Some rational reason must be found, it is said, for singling out barber shops; another way of putting it is to say that some rational reason must be shown why the legislature did not go farther. It would not be argued that the legislature must go, if at all, to the full length of closing all shops, including that of the apothecary. Some line must be drawn; and it is conceivable that the legislature may from their present knowledge feel incompetent to draw that line. They may feel sure that barbers should fall on the prohibited side, and yet be in just doubt as to other occupations. Can it be said, then, that the legislature might not have had a reasonable ground for declining to carry their prohibition to its utmost extent? If not, then there is a conceivable reason why it should have stopped where it did. If, whenever a mischief arose in any particular instance, it were necessary for the legislature to consider all other possible instances to which they might think the mischief applied, legislation would indeed be a slow process.

There has been a tendency in some of our States, especially in Illinois, to drift away from what is here conceived as the proper view of the power of a legislature to pass "special legislation." On the other hand, the



Supreme Court of the United States has repeatedly affirmed that because legislation is special it does not therefore deny the equal protection of the laws. *Missouri Pac. R. R. v. Humes*, 115 U. S. 512; *Barbier v. Connolly*, 113 U. S. 27; *Missouri R. R. v. Mackey*, 127 U. S. 205; *Minnesota R. R. v. Beckwith*, 129 U. S. 27. In *Soon Hing v. Crowley*, 113 U. S. 704, it was said, "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws." See also an able dissenting opinion in *State v. Loomis*, 115 Mo. 307.

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IS A TRUST INVALIDATED BY LACK OF BENEFICIARIES?—A recent Alabama case, *Festorazzi et al. v. St. Joseph's Church of Mobile et al.*, 18 So. Rep. 394 (Ala.), raises again the question involved in *Morice v. Bishop of Durham*, 10 Vesey, 521, whether under a bequest for an indefinite object the trustee shall be allowed to carry out the testator's wishes. The court decreed that the trustees of a bequest "to be used in solemn masses for the repose of my soul," should not perform the trust, but that the sum must be held in trust for the testator's next of kin. This accords with *Morice v. Bishop of Durham*, and decisions in several of the American States, particularly New York, where the doctrine was made famous by the ruling on the "Tilden Trust." The doctrine obviously is based on the fact that there is nobody who can compel performance according to the terms of the will, and therefore there is no legal trust. But under this doctrine the testator's wishes are utterly defeated. It is admitted that if the honorary trustee does not choose to fulfil his trust, he should become constructive trustee for the testator's next of kin, since the testator never intended him to receive the benefit, and next to the intended beneficiary the testator's next of kin have the best equitable right. But it would seem to be better justice and equally good law that where the trustee is willing to fulfil his duty he should not be interfered with.

In most jurisdictions an exception to this doctrine of *Morice v. Bishop of Durham* is taken in the case of charitable trusts. Even in New York the exception is now established by statute. The place of the *cestui que trust* is assumed by the State. In Massachusetts and Pennsylvania a bequest for masses is held to come within this exception. But elsewhere, on the theory of *Morice v. Bishop of Durham*, a bequest for masses is void, except in Ireland, where by numerous decisions the trustee is allowed to fulfil the trust. In England such a bequest is void as a superstitious use (1 Ames's Cas. on Trusts, 210, 211); yet a gift *inter vivos* upon trust for masses is in general valid, even in New York, where *Morice v. Bishop of Durham* is in other respects followed to the bitter end. In addition to these departures from *Morice v. Bishop of Durham*, there are several groups of cases indistinguishable from it in principle, in which equity judges have declined to prevent the performance of a purely honorary trust. Such cases are those of bequests in trust for erection

of monuments, maintenance of pet animals, and transportation and liberation of slaves.

Both on principle and on the authority of the adverse decisions, the doctrine of *Morice v. Bishop of Durham*, it is submitted, ought not to be followed except in jurisdictions absolutely bound by their own precedents. The court should interfere at the instance of the testator's next of kin only where there has been a failure or refusal to perform the imposed duty. See 5 HARVARD LAW REVIEW, 389-402.

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PURCHASE OF OUTSTANDING TITLE BY A TENANT IN COMMON. — In *Van Horne v. Fonda*, 5 Johns. Ch. 388, Chancellor Kent declared that it was inconsistent with good faith and the mutual obligations arising from community of interest for one tenant in common to purchase an outstanding paramount title for his exclusive benefit, and that he did not propose to sanction it. Thus was laid the foundation of a rule which has since become well settled in our law. Whatever title is so acquired inures equally to the benefit of the cotenant, provided only the latter elects, within a reasonable time, to accept it and bear his portion of the expense. Courts follow the lead of the distinguished Chancellor in finding a reason for the rule in the relations of mutual trust and confidence created by joint interest in a common subject. That there may well be cases of cotenancy where no such relation in fact exists, has always been recognized (see *Van Horne v. Fonda, supra*), and accordingly an exception, which two recent cases illustrate, has grown up beside the rule. In *Stevens v. Reynolds*, 41 N. E. Rep. 931, the Indiana court held that the rule does not apply where the original interests of the cotenants were acquired under different instruments, from different sources, and at different times; and the Texas court, in *Fielding v. White*, 32 S. W. Rep. 1054, reached a similar conclusion, laying stress on the additional fact that there had never been any understanding between the parties concerning their interests in the land. Both courts base their conclusions on the absence of that relation of mutual trust on which Chancellor Kent founded his rule, and the results reached are in accord with the weight of authority. *Elston v. Piggott*, 94 Ind. 14; *Roberts v. Thorn*, 25 Tex. 728; *King v. Rowan*, 10 Heisk. 682; Freeman on Cotenancy and Partition, § 155. *Contra, Bracken v. Cooper*, 80 Ill. 229.

The doctrine laid down in these cases certainly seems unexceptionable. But the general rule itself, to which they establish an exception, though unassailable in point of authority, appears to be somewhat objectionable in principle. Apart from special circumstances, what relation of trust exists between tenants in common which the law can recognize? They may in general deal with each other as with strangers. One may drive as sharp a bargain as he pleases in buying out the other's interest. Unfair and dishonorable as it may often be for one to oust the other by the purchase of a superior outstanding title, it is hard to see what principle of law there can be to forbid it. If, indeed, the tenants are partners, or if one is given charge of the common property by the others, or any other circumstances exist which give rise to a real fiduciary relation between them, the courts may well regard the act under discussion as a breach of obligation. But the bare fact of tenancy in common, where there is actually no relation of mutual confidence, should entail no such consequences.



WHEN DOES A COLLECTING BANK BECOME A DEBTOR?—Two recent cases sharply illustrate the divergence of judicial opinion regarding the liabilities of a bank that has collected paper for another. In one instance the collection was made before the insolvency of the collecting bank, and after insolvency the latter was held a trustee for the amount collected. *Winstandley v. Second Bank of Louisville*, 41 N. E. Rep. 956 (Ind.). In the other case the collection was made after insolvency, but before assignment, and the collecting bank was held a debtor. *Sayles v. Cox*, 32 S. W. Rep. 626 (Tenn.).

The Indiana court assumes that the collecting bank was a trustee, and devotes itself chiefly to the discussion of whether the trust fund can be traced into the bank assets. This assumption seems erroneous. The ordinary understanding and usage between banks and their customers, when notes are indorsed to a bank for collection, is not that the bank is to keep separate the proceeds and remit them *in specie*, but that they are to be turned into the general funds of the bank, which then becomes liable for the amount either by a check to the customer, or a draft in his favor upon some third person. Such being the usual understanding, it is just to hold, in the language of the Massachusetts Supreme Court, that "one who collects commercial paper through the agency of banks must be held to impliedly contract that the business may be done according to their well known usages, so far as to permit the money collected to be mingled with the funds of the collecting bank." *Freeman's Bank v. National Tube Co.*, 151 Mass. 413. As pointed out in *Tinkham v. Heyworth*, 31 Ill. 519, banks charge no fee for holding money collected, except the right to use it until it is demanded, and if they are not to be allowed to exercise this, they must be entitled to compensation as safety deposit companies for moneys collected,—an idea not apt to enlist commercial favor. Certainly all arguments based upon commercial convenience and usage support the view that after collection the collecting bank should be considered a debtor, and if it becomes insolvent before the customer has been paid the latter must come in with the other general creditors. Nothing in this, of course, prevents a collecting bank from making itself a trustee by special understanding with its customer, as in *Bank v. Weems*, 69 Tex. 489.

The Tennessee case errs in the opposite direction. When the officers of a bank know it to be insolvent at the time they accept the paper for collection, it is a fraud upon its customer for the bank to take the proceeds in exchange for its own liability, and after collection they should be treated as trust property for the customer's benefit. *Somerville v. Beal*, 49 Fed. Rep. 790; *Fockusch v. Towsey*, 51 Tex. 129.

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## RECENT CASES.

ACCIDENT INSURANCE—CONSTRUCTION OF POLICY.—*Held*, under a policy insuring "against the loss of the money value of his time," a recovery may be had for time actually lost, though the employer of the insured continued his pay during his disability. *Globe Acc. Ins. Co. v. Helwig*, 41 N. E. Rep. 976 (Ind.).

Whether or not an ordinary accident policy is a contract of indemnity, there can be no doubt that the court was right in assuming this particular one to be of that nature. As to the question of loss to the plaintiff when his employer had continued his wages,



it would seem to turn on whether the amount received was derived from the enforcement of a legal right, or was a pure gift. Proceeding on the latter assumption, as the court did, the decision is sound, but the former case might easily arise, as, for instance, by the temporary illness of a school teacher.

**ADMIRALTY — SUBJECT MATTER OF SALVAGE — GAS FLOAT IN A RIVER.** — A float, fifty feet long, with ends shaped like the bow of a vessel, but without mast or rudder, was moored in a river as a beacon. It contained a gas cylinder, the light being fixed on a structure fifty feet high, the gas supplying it continuously for six weeks. No one was stationed upon the float, which went adrift, and was secured by the plaintiff, who assisted the Trinity yacht in getting it off. *Held*, the float was not subject matter of salvage. *Gas Float Whitton, No. 2, 12 The Times Law Rep.* 109.

The opinion emphasizes the point that jurisdiction as to salvage is limited to claims for services to a ship, her equipment, cargo, etc. And the term "ship" is to be used only in the ordinary meaning among those conversant with shipping business. A more liberal construction seems to have been placed upon the word in *The Mac, L. R. 7 Pro. Div. 127*, where a hopper barge was held subject of salvage. Certain passages in the opinions in the latter case might well justify the position taken by the respondents in the present appeal. In America the cases conflict upon both points. *A Raft of Spars, Abb. Adm. Rep.* 485; *Fifty Thousand Feet of Timber, 2 Lowell, 64*, and *Bywater v. A Raft of Piles, 42 Fed. Rep. 917*, hold the articles named subject to salvage, though of course not to be defined as "ships." *Tome v. Four Cribs, Taney's Dec. 533*, and the English case of *Palmer v. Rouse, 3 H. & N. 505*, are apparently *contra*, though perhaps affected by custom or statute. *Cope v. Valette Co., 119 U. S. 625*, *held*, that the District Court had no jurisdiction over the salvage of a floating dry dock, and the court seems to incline to the strict definition of the principal case, though noticing (p. 630), without comment, the conflict of authority in regard to timber. But perhaps, as is said in 42 *Fed. Rep. 917*, the cases vary so widely in their circumstances that all of the decisions may be reconcilable, though not without infringing upon the strict rule laid down in the principal case.

**AGENCY — VICE-PRINCIPAL BECOMES FELLOW SERVANT WHEN.** — Plaintiff's intestate was killed while engaged in a work in which the foreman of the shop was assisting him. It was no part of the business of the foreman to assist the deceased. *Held*, the foreman was a fellow servant of the deceased, not a vice-principal, by virtue of their being engaged upon the same work. *Hartford v. No. Pac. R. R., 64 N. W. Rep. 1033 (Wis.)*.

The decisions on this point are numerous and there is some conflict in the results reached, but since *Railroad Co. v. Baugh, 149 U. S. 368*, the doctrine of the principal case has been pretty well established. *Hanna v. Granger, 28 Atl. Rep. 659 (R. I.)*, is a recent well considered decision in accord.

**CARRIERS — LIABILITY OF A RAILWAY COMPANY FOR A TORT OF ITS SERVANT.** — Plaintiff's intestate was shot by the depot agent of the defendant railway for abusive language. Deceased had called to receive his baggage, and, having been given receipts for it, was stepping out of the door when he was hit by the bullet. *Held*, a finding by the jury that the agent was acting within his employment so as to render the railway company liable will not be disturbed. *Daniel v. Petersburg Ry. Co., 23 S. E. Rep. 327 (N. C.)*.

The case is a close one. The trial court might have been justified in ordering a contrary finding, on the ground that the agent was acting from a sole motive, and that his employment as regarded the decedent had ceased. As to such action by the trial judge, it is interesting to compare the case with *McGilvray v. West End St. Ry., 164 Mass. 122*, deciding that a street railway company is not liable for an assault by a conductor on a person who had just alighted from the car outside the car-house. If the decision of the majority of the court is not open to exception in the principal case, the language of the concurring judge is, as he seems to put the liability on the ground of common carrier, regardless of whether or not the agent was acting at the time in the course of his employment. Does a railway company owe the duty of insurer to a man on its premises in decedent's position? Surely not. The contract of carriage was at an end.

**CARRIERS — SLEEPING CAR COMPANIES — LIABILITY FOR MONEY LOST BY PASSENGER.** — The plaintiff sues the Pullman Company for a sum of money lost at night while he was a passenger on one of its cars. *Held*, the company's duty is to maintain such a watch "as may be reasonably necessary to secure the safety" of such of the passenger's goods as are properly in his possession as a traveller. If the loss occurs while the passenger is asleep, the burden is on the company to prove such case. *Kates v. P. P. C. Co., 23 S. E. Rep. 186 (Ga.)*.

Ever since sleeping cars have been in general use, the courts with almost uninterrupted regularity have decided that inasmuch as the sleeping car companies are neither innkeepers nor common carriers, they are not under the extreme liability attaching to those occupations. *P. P. C. Co. v. Smith*, 73 Ill. 360; *Blum v. S. P. P. C. Co.*, 1 Flippin, 500; *Lewis v. N. Y. P. C. Co.*, 143 Mass. 267. The Georgia court discusses the relationship of the company to the passenger on its own merits, and, notwithstanding the necessity which the sleeping car has become, the defenceless condition of the passenger, and the consequent resemblance to that state of facts which developed the heavy responsibility of the innkeeper, reaches the same conclusion as the cases cited. The single case opposed to the current of authority is *P. P. C. Co. v. Lowe*, 28 Neb. 239, holding the company an innkeeper.

**CONFLICT OF LAWS — FOREIGN JUDGMENTS — CONCLUSIVENESS.** — *Held*, Judgments rendered in France, by whose laws judgments of the United States courts are reviewable on their merits, are not conclusive when sued upon in the United States, but are only *prima facie* evidence of the justice of the plaintiff's claim. (Fuller, C. J., Harlan, Brewer, and Jackson, JJ., dissenting.) *Hilton v. Guyot*, 16 Sup. Ct. Rep. 139.

The case presents a fundamental question, and one likely to occur very often. The decision, therefore, is of more than ordinary importance. On strict common law principles it can hardly be supported. It has long been settled that our courts will respect and enforce private rights acquired under foreign laws, and it is difficult to see why a right acquired under a foreign judgment does not come within this category. The fact that France does not recognize United States judgments as conclusive would seem to be a political argument, rather than a legal ground, for refusing to recognize the judgments of France. It presents a question of the comity of nations. The court falls into the error of supposing that comity means reciprocal courtesy. If comity is a part of the common law, as we believe it to be, the courts have no discretion to apply it in one way to one country and in another way to another country. The dissenting opinion of Mr. Chief Justice Fuller seems entirely sound.

The decision follows the rule adopted in most of the Continental countries, and which was formerly the rule in England; *Roach v. Garvan*, 1 Ves. Sr. 157; but has since been disapproved by the English courts, which now hold that foreign judgments are impeachable only on the ground of fraud or lack of jurisdiction. *Nouviou v. Freeman*, 15 App. Cases, 1, 9; *Goddard v. Gray*, L. R. 6 Q. B. 139-148. Some of our State courts are in accord with the modern English doctrine, and treat foreign judgments as conclusive. *Dunstan v. Higgins*, 138 N. Y. 70 (1893); *Rankin v. Goddard*, 55 Me. 389; *Baker v. Palmer*, 83 Ill. 568.

**CONFLICT OF LAWS — FOREIGN JUDGMENT — SERVICE OF PROCESS.** — A defendant who is duly served with process while temporarily in Sweden, and who appears by attorney, is amenable to the jurisdiction of its courts, and a judgment against him will be enforced in the courts of England. *Carrick v. Hancock*, 12 *The Times Law Rep.* 59.

A foreign judgment *in personam* obtained without service of process on the defendant is internationally invalid, but if the defendant appears, though under protest, any judgment will be enforced by the courts of his domicile if the court of original judgment had jurisdiction. *Voinet v. Barrett*, 58 L. J. Q. B. 39; *Boissière & Co. v. Brockner & Co.*, 6 *The Times Law Rep.* 85. The court holds also that the duty of allegiance is correlative with the protection given by a state to every one within its territory, and that a valid service of process may be made upon a defendant as soon as he enters the country, irrespective of the time he intends to remain.

**CONFLICT OF LAWS — GENERAL COMMERCIAL LAW — RIGHT OF STATES TO CHANGE.** — Defendant in Wisconsin put his name on the back of a note payable in Massachusetts. According to decisions in Wisconsin, this made him an indorser; according to United States decisions, he was a joint maker. A statute in Massachusetts made notice to such person necessary to his liability. *Held*, that the United States court would not follow the decisions of the State court in matters of general commercial law, and that defendant was a joint maker; but that the court would apply the statute of Massachusetts, under which defendant was not liable. *Phipps v. Harding*, 70 Fed. Rep. 468.

The first point is the settled doctrine in the Federal courts. It was argued from this and from certain language in *Swift v. Tyson*, 16 Pet. 1, 18, and *Watson v. Tarpley*, 18 How. 517, 521, that State statutes should also be disregarded. The *dicta* referred to do give ground for the contention, but the court refuses to follow them and limit the legislative power of the States. The decision on the second point cannot be objected to in effect, but it seems perhaps to be somewhat inconsistent with the first.



**CORPORATIONS — LIABILITY OF PROMOTERS.** — Several persons associated themselves for the purpose of organizing a corporation, entered into contracts in the name of the proposed corporation, and then abandoned their purpose. *Held*, the relation of such promoters to each other is that of principal and agent, and each is liable for such contracts as he authorized or ratified. *Roberts Manuf. Co. v. Schlick*, 64 N. W. Rep. 826 (Minn.).

This is the doctrine admirably stated in *Johnson v. Corser*, 34 Minn. 355, and, it is submitted, is correct. The notion that such promoters are liable as partners or nothing (*Martin v. Fewell*, 79 Mo. 401), is indefensible. The ordinary principles of agency cover the case.

**EQUITY — ASSIGNMENT FOR BENEFIT OF CREDITORS — MARSHALLING ASSETS.** — Where a debtor made a general assignment for all his creditors, it was *held* that a creditor whose debt was partly secured by a lien on specific property could recover from the assignee on the basis of his whole debt without deducting the amount which he would realize on his separate lien. *Winston v. Biggs*, 23 S. E. Rep. 316 (N. C.).

In many States a secured creditor is allowed to receive a dividend only upon the balance remaining unpaid after exhausting his security. *Wurtz v. Hart*, 13 Iowa, 515; *National Union Bank v. National Mechanics' Bank*, 30 Atl. Rep. 913 (Md.); *Merchants' Bank v. Eastern Ry. Co.*, 124 Mass. 518. The prevailing view, however, is in accord with the principal case. *Allen v. Danielson*, 15 R. I. 481; *West v. Bank of Rutland*, 19 Vt. 403; *Paddock v. Bates*, 19 Ill. App. 470; *Moses v. Raulet*, 2 N. H. 488; *Graeff's Appeal*, 79 Pa. St. 146; *Kellock's Case*, L. R. 3 Ch. App. 769. These latter cases, it is submitted, are correct, resting on the theory that the security is something collateral, and does not reduce the debt, but only secures the creditor *pro tanto* in case the debtor cannot pay.

**EQUITY — INJUNCTION TO RESTRAIN COLLECTION OF DEBT BY ASSIGNING CREDITOR.** — Defendant was indebted to plaintiff, and W. was indebted to defendant. Defendant made a written assignment to plaintiff of W.'s debt to him, and W. assented. Defendant then sued W. for the debt assigned and recovered, W. failing to protect himself by pleading the novation. Plaintiff now petitions for an injunction to restrain defendant from collecting the judgment. *Held*, that plaintiff still had his remedy at law against W., who had subjected himself to a double recovery. Injunction refused. *Perry v. Thompson*, 18 So. Rep. 524 (Ala.).

Plaintiff's rights of course are not prejudiced unless W. is insolvent, in which case the injunction should have been granted.

**EQUITY — STATUTE OF LIMITATIONS — MISTAKE.** — The plaintiff in this case claims under a will which was discovered twenty years after the testator's property had been distributed among his next of kin. *Held*, that the action was not barred, since there was mutual and blameless mistake. *Crawford's Adm'r v. Smith's Ex'r*, 23 S. E. Rep. 235 (Va.).

In this country the statute of limitations operates as a bar in equity, as well as law, *ex suo vigore*. But where through fraud or mistake it would be inequitable to permit it to bar the suit, courts of equity interpose, as in England. Fraud and mistake come within the same rule. *Brooksbank et al. v. Smith*, 2 Young & Coll. 58; *Hough v. Richardson*, 2 Story, 659; *Story's Equity Jurisprudence*, § 1521 a.

**EVIDENCE — CONFESSION — ADMISSIBILITY.** — *Held*, that a confession to an officer, who informed his prisoner "that it might go lighter with him if he told all about" the crime, was admissible as evidence. *Thomas v. State*, 32 S. W. Rep. 771 (Tex.).

The decision is based upon the erroneous assumption that a positive promise is necessary in order to render a confession inadmissible. It might well have been held that the officer's words to the defendant furnished an inducement fatal to the trustworthiness of the confession, and this conclusion is authorized in the books. *Com. v. Curtis*, 97 Mass. 574; *State v. York*, 37 N. H. 175. Of course, were a positive promise made, the confession obtained thereby would be properly excluded. Such was the decision in the recent case of *State v. Smith*, 18 So. Rep. 482 (Miss.).

**EVIDENCE — INSANITY.** — Defendant was indicted for burglary; plea insanity. *Held*, that evidence by the prisoner's mother that she had another son, an imbecile from birth, should be admitted. *Schaeffer v. State*, 32 S. W. Rep. 679 (Ark.).

The court cites *People v. Garbutt*, 17 Mich. 9, as directly in point, and the decision follows the weight of authority in this connection. Such evidence of a family trait is cumulative, and is only admissible in connection with and in support of other evidence tending to a direct proof of the same fact. This the court recognized in the present case. See *Snow v. Benton*, 28 Ill. 306; *People v. Smith*, 31 Cal. 466; and Wharton & Stille's Medical Jurisprudence, §§ 375, 377.



**EVIDENCE — HEARSAY CONTRADICTING DYING DECLARATIONS.** — *Held*, that dying declarations may be impeached by proof of previous contradictory statements by the deceased. *State v. Lodge*, 33 Atl. Rep. 312 (Del.).

The general rule is that a witness can be discredited by proof of contradictory statements made out of court, only where he has been given an opportunity to explain. 1 Greenleaf on Evid., § 462. In accordance with this, such statements have been held inadmissible where it has been impossible to call the attention of the witness to them. *Weir v. McGee*, 25 Tex., Supp., 20, where the testimony was by interrogatories, and the witness not in court. *Craft v. Comm.*, 81 Ky., 250, and *Ayres v. Watson*, 132 U. S. 394, where the witness had died. These cases seem closely in point, and the argument of the court here is not altogether satisfactory. It is that, since the defence is deprived of cross-examination in the matter of the dying declarations, the previous statements should be admitted without the usual foundation, in order to offset the loss. This sounds like an attempt to make a right of two wrongs. One judge dissents.

**EVIDENCE — OTHER CRIMINAL ACTS TO PROVE INTENT.** — Defendant was on trial for manslaughter. One Emma Hall died on February 3, 1895; her death was the result of an abortion. Deceased was shown to have gone to the house at which her death occurred, for the purpose of having a criminal operation performed. Defendant was shown to have attended her from January 25 until her death. Defendant was proved to have concealed and lied about the circumstances of Emma Hall's death. *Held*, that the testimony of three witnesses, that defendant had performed operations upon them at the house where deceased died, and about the same time, was properly admitted. *People v. Seaman*, 65 N. W. Rep. 203 (Mich.).

The testimony of these three witnesses tends to prove that defendant treated deceased with the purpose and object of procuring an abortion. Since this evidence has probative force tending to prove defendant's purpose or intent in his attendance upon deceased, the objection that to admit this evidence is to admit evidence of other criminal acts of defendant is not fatal. In *Reg. v. Briggs*, 2 Moody & R. 199, the defendant was on trial for robbery; a witness was allowed to testify that defendant had committed another robbery in the same vicinity, and about the same time as the robbery for which defendant was on trial. The authorities fully sustain the admission of the evidence objected to in the principal case. *People v. Sessions*, 58 Mich. 594; *Kramer v. Com.*, 87 Pa. St. 299; *Thayer v. Thayer*, 101 Mass. 111; *Reg. v. Gray*, 4 F. & F. 1102; *Reg. v. Dorset*, 2 Cox C. C. 243; *Reg. v. Garner*, 3 F. & F. 681.

**INSURANCE — MARINE — VALUED POLICY AGAINST FIRE — DAMAGE BY STRANDING.** — A ship, insured by a valued policy against fire, became a constructive total loss through stranding, and while stranded was totally consumed by fire. *Held*, that the underwriters were liable, and that the valuation in the policy was binding. *Woodside v. Globe Marine Ins.*, 12 The Times Law Rep. 97.

The principal question in the case would seem to be whether the ship, at the time of the fire, could still be fairly deemed a ship, or must be regarded as a mere collection of materials. The case was argued under what seems to have been an agreement supporting the former view. It bears an analogy to those in which a building, by reason of explosion, storm, or otherwise, has collapsed, and the ruins have caught fire and been consumed. The question in such cases is whether, at the time of the burning, the building may still be called such, or must be deemed merely a heap of rubbish, the law seeming in the first case to permit a recovery upon the policy, though for fire only. *Nave v. Mut. Ins. Co.*, 37 Mo. 430; *Evans v. Columbian Ins. Co.*, 44 N. Y. 146; *May, Ins.*, § 412; *Biddle on Ins.*, § 771. For the doctrine that the stated valuation determines the amount of the insurer's liability, see, in addition to the cases cited, *Irving v. Manning*, 1 H. L. C. 287.

**JUDGMENT LIEN — PRIORITY ON AFTER-ACQUIRED LAND.** — The plaintiffs and defendants both had judgments against a third party, who, after the judgments had been rendered, acquired the land in dispute. A statute provided that a lien should arise on any after-acquired land in favor of the judgment creditor. The defendants' judgment in this case was senior, and they claimed satisfaction of their judgment in full before the junior judgment of the plaintiffs should attach. *Held*, that the liens of the docketed judgments attaching to the land at the same moment, there should be no priority, and the proceeds of the land should be applied *pro rata* to the judgments. *Moore et al. v. Jordan et al.*, 23 S. E. Rep. 259 (N. C.).

In *Creighton v. Leeds, Palmer, & Co.*, 9 Or. 215, upon the same facts and under a similar statute priority of lien was allowed the senior judgment on the ground that, since the lien was an incident of the judgment, the priority of the lien would be coextensive with that of the judgment. This view seems sounder, and is maintained by a dissenting minority in the present case. Previous decisions in another State support neither of

these views, but give priority to the judgment creditor, who first proceeds to enforce his judgment. In one case this is explicitly based on the ground that the "writ and not the judgment created the lien." *Bliss v. Clark*, 39 Ill. 590; *McDonald v. Crandall*, 43 Ill. 231; *Freeman on Judgments*, § 355.

**MUNICIPAL CORPORATIONS — COUNTIES — FAILURE TO REPAIR BRIDGE.** — *Held*, in the absence of a statute imposing such liability, a county is not liable for injuries resulting from defects in a bridge, though the county is under a duty to keep it in repair, and the non-repair is due to the negligence of the county officers. *Board of Com'rs of Jasper Co. v. Allman*, 42 N. E. Rep. 206 (Ind.).

This decision overrules a long line of Indiana cases, beginning with *House v. Montgomery Co.*, 60 Ind. 580 (1878), and extending to *Parke Co. v. Wagner*, 138 Ind. 609 (1891). The rule that a county is a subdivision of the State for governmental purposes, and is not liable for the negligence of its officers, unless expressly made so by statute, is recognized by an overwhelming majority of the decisions, both English and American. The rule seems to have originated in the case of *Russell v. The County of Devon*, 2 T. R. 667. The only jurisdictions now holding *contra* to the general rule are Iowa and Maryland. See *Yordy v. Marshall Co.*, 80 Iowa, 405; *Calvert Co. v. Gibson*, 36 Md. 229. The opinion in the principal case contains a complete citation of the modern authorities.

**PARTNERSHIP — TRANSFER OF PARTNER'S INTEREST AFTER INSOLVENCY — RIGHTS OF FIRM CREDITORS.** — A. of the firm of A. & B. transferred his interest in the firm assets to B. after the firm was known to be insolvent. B., according to the view of the majority of the court, agreed to hold the assets in trust for the firm creditors. B. conveyed to C., who took with full notice of all the facts. C. used the conveyed property in his business under the name of C. & Co., holding B. out as his partner. In fact there was no partnership. *Held*, with a minority dissenting on both points, (1) that creditors of the ostensible firm of C. & Co., upon C.'s assignment in insolvency, were entitled to have the property used in C. & Co.'s business applied as firm assets to the payment of their claims; (2) that creditors of the original firm of A. & B. should come in against this property *pari passu* with the creditors of C. & Co. *Thayer v. Humphrey*, 64 N. W. Rep. 1007 (Wis.).

Ordinarily, creditors of an ostensible partnership are entitled to priority of payment out of the property used in the business, upon the insolvency of the true owner. *In re Rowland and Crankshaw*, L. R. 6 Ch. Ap. 421; *Ex parte Hayman*, 8 Ch. Div. 11. In the present case, however, the creditors of C. & Co. should be postponed to the creditors of A. & B. to the extent that the assets of A. & B. can be found *in specie*, or distinctly traced. If B. agreed to hold in trust, of course C. took as trustee for the firm creditors of A. & B. If there was no agreement to hold in trust still, as the conveyances of A. & B. were both made after the firm was known to be insolvent, both were void for fraud as against the firm creditors, who therefore have a prior lien on the original firm assets in the hands of C.'s assignees. *Ex parte Mayon*, 4 De G., J. & S. 664; *In re Kemptner*, L. R. 8 Eq. 286; *Peyser v. Myers*, 135, N. Y. 599 (*semble*); *Lind*, on Part. (6th ed.), 347, 716. It is not suggested in the case that the firm creditors of A. & B. were guilty of laches.

**PERSONS — WIFE'S SEPARATE ESTATE IN EQUITY — WHEN CREATED.** — Money which a husband allows his wife to acquire by the sale of poultry, etc., to use as she pleases, and of which he loses sight till it has been invested in real estate by her for eighteen months, forms her separate estate. If she refuses to complete the purchase of the land, and pleads coverture, the vendor can sell the land to reimburse himself for the amount unpaid by her. *Snodgrass v. Hyder*, 32 S. W. Rep. 764 (Tenn.).

At common law a wife had no separate estate. All her chattels and earnings vested in her husband outright. Equity gradually modified this harsh doctrine, and allowed a wife an estate in property acquired by her, treating the husband as a constructive trustee. 2 Kent, 134, 143. Under this rule she could recover property promised her by her husband from his heirs, provided the rights of creditors did not intervene. This was held in spite of the rule that husband and wife could not contract. *Slansing v. Style*, 3 P. Williams, 337. As there was no statute in Tennessee enlarging the power of a married woman to bind herself by contract except in regard to conveyance of her estate, the court was bound by the common law rule. But it thought there was sufficient evidence from which to imply a gift to the wife, and that consequently the money formed her separate estate in equity. The second point, *viz.*, that the vendor could sell the estate to recoup himself for the unpaid purchase money, seems equally clear. The court's ruling that the vendor had no right to a personal judgment against her is without exception in view of the weakness of the Tennessee statute in regard to married women. And though there is a division of opinion on the question whether a wife's separate estate can be bound by implication on her contract, *Murray v. Barlee*,



3 Myl. & Keene, 209, holding that it can, and *Yale v. Deverer*, 22 N. Y. 451, that it cannot, the court's ruling that it could not in this case is scarcely doubtful, as the evidence to show any implication was slim.

**PROPERTY — COVENANT OF WARRANTY — MARRIED WOMEN'S ACT.** — Defendant's wife owned real estate. Defendant lived on the land with his wife, and joined in her conveyance and covenant of warranty. The wife is dead. This is an action on the covenant by a remote grantee. *Held*, defendant is not bound. The covenant does not run with the land; the defendant having no such privity of estate as is essential to carry a covenant of warranty. *Mygatt v. Coe*, 42 N. E. Rep. 17 (N. Y.).

This case is interesting as showing one of the results of the Married Women's Act by which the wife holds absolute title to her real property as though she were unmarried. At common law the defendant would have been bound in this case, for he would have had an estate during coverture in his wife's property, and this would have constituted sufficient privity of estate to have carried the covenant with the land. *Robertson v. Norris*, 11 Q. B. 916; *Beale v. Knowles*, 45 Me. 479.

**PROPERTY — EASEMENT IN STREET — ABANDONMENT.** — Plaintiff owned property abutting on a street over which the defendant company had erected an elevated road. This action was brought for damages for the obstruction of plaintiff's street easements. The defendant attempted to establish an abandonment of these easements by proof of the following facts. Plaintiff's lot had been owned by one L., who had brought suit against the present defendant for the same obstruction. While the suit was pending, L. conveyed to G., the conveyance being accompanied by an attempt on the part of L. to reserve to himself by an unrecorded instrument the street easements and the right of suit for their obstruction. G. conveyed the lot to the plaintiff, who had no notice of this agreement. Then L. settled his action against the defendant company, and gave them a release from all claims by reason of the operation of their road, and declaring that he had intended such release at the beginning of his action. *Held*, that there was no effectual abandonment by L.; that the unrecorded agreement between L. and G. was inoperative at law, and that the plaintiff was entitled to damages for the obstruction of his easements. *Footle v. Metropolitan El. Ry. Co. et al.*, 42 N. E. Rep. 181 (N. Y.).

This case is peculiar in its facts. The conclusion reached as to the abandonment, which is purely a matter of intention and of fact, seems correct. See Washburn on Real Property, 4th ed., vol. ii. p. 371, and cases cited. The plaintiff was of course unaffected by the unrecorded agreement between his predecessors in title, and the rights of property in the street, being appurtenant, passed with the abutting land.

**PROPERTY — LANDLORD AND TENANT — ASSIGNMENT OF RENT — REVERSION.** — A. let premises to B. for five years. B. sublet a part of the premises to the defendant for the same time. Defendant assigned his lease to C., with covenant that his liability to B. should not be thereby altered. B. assigned back to A. all rentals due under his lease to defendant. A. then conveyed to plaintiff all his interest in land and existing leases held by him. C. failed to pay rent, and plaintiff sued defendant. *Held*, that, as B.'s lease to defendant terminated at same time as A.'s lease to B., leaving no reversion in B., B.'s assignment of rentals to A. amounted to an assignment of the lease of defendant, and this passed to plaintiff by A.'s subsequent assignment. Plaintiff therefore could sue defendant on latter's covenant to B., the effect of which made defendant primarily liable for the rent, and not as mere surety for C. *Latta v. Weis*, 32 S. W. Rep. 1005 (Mo.).

The contention of defendant's counsel was that B. retained a reversion because only the rentals were conveyed to A., and that A.'s assignment of his interest in the land gave plaintiff no right to the rentals which still belonged to A. The court seems properly to have held that, when B. parted with all beneficial interest in the land, to the very end of his own term, it amounted to a complete assignment.

**PROPERTY — LANDLORD AND TENANT — IMPLIED COVENANT FOR QUIET ENJOYMENT.** — The defendant, having a lease for eight years in certain premises, sublet them for ten years to the plaintiff, acting in good faith and under a *bona fide* mistake; the word "demise" was not used in the sublease nor was there any express covenant for quiet enjoyment. The plaintiff, being evicted at the end of eight years by the superior landlord, brings action against his lessor for breach of implied covenants. *Held*: (1) A covenant cannot be implied unless the word "demise" is used. (2) If such a covenant were implied it would extend only during the estate of the lessor. *Baynes v. Lloyd*, [1895] 2 Q. B. 610.

The court expresses doubt on the first point. It has been held otherwise in this country. *Duncklee v. Webber*, 151 Mass. 408. As to the second point, the court relies



on the doctrine that the implied covenant of a life tenant ceases with his life, which is undoubted law on both sides of the Atlantic. *McClowry v. Crogan*, 1 Grant, (Pa.) 311. But where the lessor's estate has determined through an act of his own doing, it has been held, both in this country and in England, that the lessee can recover against him. *Price v. Williams*, 1 M. & W. 6; *Duncklee v. Webber*, 151 Mass. 408. It seems a harsh doctrine that, when the tenant has got less than he bargained for through his landlord's negligence, the landlord cannot be held accountable.

**PROPERTY — PURCHASE OF OUTSTANDING TITLE BY TENANT IN COMMON.** — *Held*, that the general rule that a tenant in common may not acquire an outstanding title as against his cotenant, does not apply where the original interests of such cotenants were acquired under different instruments, from different sources, and at different times. *Stevens v. Reynolds*, 41 N. E. Rep. 931 (Ind.). See NOTES.

**PROPERTY — STATUTE OF LIMITATIONS — PERMANENT AND TRANSIENT INJURY DONE BY A NUISANCE.** — The defendant diverted the course of a stream in 1885, so that it ran against the pier of the plaintiff's. No substantial injury was done until 1890. Plaintiff brings this action for the actual damages suffered. *Held*, the statute of limitations did not commence to run until actual damage resulted. *Howard County v. Railroad*, 32 S. W. Rep. 651 (Mo.).

The case proceeds on the ground that when a nuisance is of such a character that the resulting damage cannot be measured once for all at the time of its creation, but depends upon future events, then the statute of limitation does not apply, for a new cause of action arises with every new encroachment; but when the nuisance has become permanent in its nature, so that the amount of injury can be estimated, then a cause of action arises to which the statute is applicable. 1 Wood on Limitations (2d ed.), § 180. It is to be observed that the decision is not in conflict with cases which hold that the period of prescription begins to run before there is actual damage. *Dina v. Valentine*, 5 Met. 8. See *Wells v. New Haven Co.*, 151 Mass. 49.

**SALES — ACTION FOR PRICE — DAMAGES.** — Defendant contracted with plaintiff for an article as follows. "In consideration of its delivery for me . . . at the express office specified below, I promise to pay \$35, \$10 on delivery at the express office, and the balance in monthly instalments," etc. Plaintiff delivered to express company and defendant refused to accept. The company then returned to the plaintiff, who held subject to defendant's order. *Held*, plaintiff could sue for the contract price, and was not limited to suing for damages for breach of contract. (Field, C. J., Allen and Norton, JJ., dissenting.) *White v. Solomon*, 42 N. E. 104 (Mass.).

The majority of the court assume, and the minority hold, that title did not pass. The question of title is therefore largely eliminated. The decision rests on the construction that delivery to the express company was the consideration for defendant's promise. On that construction, the plaintiff, having performed, could sue for the contract price, and the decision is clearly correct. See *Martineau v. Kitching*, L. R. 7 Q. B. 436, 455; *Tufts v. Griffin*, 12 S. E. Rep. 68 (N. C.). The minority of the court construed the contract as conditional, as an ordinary instalment contract, and correctly hold on this construction, that the vendor, having both title and possession, has simply an action for damages for breach of contract. See *Morse v. Sherman*, 106 Mass. 430-434.

**TAXATION — LIABILITY ON BONDS OF ANOTHER STATE.** — An insurance company holding bonds of the State of Georgia, which are deposited with the treasurer of that State, is liable to taxation upon them in Louisiana. *State v. Board of Assessors*, 18 So. Rep. 519 (La.).

The actual situs of personal property, having a visible existence, and of State and municipal bonds and circulating notes of a bank generally, determines the place where such property is taxable. But personal property, such as bonds, mortgages, and debts, in general, have no situs except the domicile of their owner. *State Tax on Foreign held Bonds*, 15 Wall. 300. As the bonds in the principal case were not in circulation, but bought by the company from the State of Georgia, and then deposited there probably as indemnity for payment of its risks, they formed the avails of the company, as the court said, and would seem to be taxable at the domicile of their owner.

**TORTS — DECEIT — INABILITY TO PERFORM A PROMISE.** — Defendant contracted with plaintiff to do a certain thing without revealing the fact that, by a contract with a third party, he had put it out of his power to perform. *Held*, that an action for deceit lay. *Traber v. Hicks*, 32 S. W. Rep. 1145 (Mo.). See NOTES.

**TORTS — NEGLIGENT MISREPRESENTATION.** — Declaration alleged that defendant prepared an abstract of title for a landowner; that defendant knew this abstract was to be used in effecting a mortgage loan; that the mortgage loan was effected; that

plaintiff afterwards became the assignee of this mortgage; that in purchasing the note secured by this mortgage plaintiff relied on the abstract prepared by defendant for the purpose of effecting the mortgage loan; that said abstract did not disclose the true record title; and that plaintiff suffered damage. *Held*, sustaining defendant's demurrer, that the declaration did not set forth a good cause of action. *Tapley v. Wright*, 32 S. W. Rep. 1072 (Ark.).

It is clear that defendant is under no contractual liability to plaintiff. If it is true that it is not the usual course of business for the purchaser of a mortgage note to rely on the abstract furnished to the original mortgagee, it is clear that defendant is not liable to the plaintiff in an action sounding in tort. But if it is the usual course of business that one purchasing a mortgage note may and does, on making his purchase, rely on the abstract prepared for the original mortgagee, there is American authority for holding defendant liable in tort. Minority opinion in *Savings Bank v. Ward*, 100 U. S. 195, at 207; *Dickel v. Abstract Co.*, 14 S. W. Rep. 896 (Tenn.). See also *Telegraph Co. v. Dryburg*, 35 Pa. St. 298; *Tobin v. Tel. Co.*, 23 Atl. Rep. 324 (Pa.). *Blood Balm Co. v. Cooper*, 83 Ga. 457. *Contra Savings Bank v. Ward*. In England, in any view of the facts of the principal case, defendant's demurrer would be sustained. *Peck v. Derry*, 14 Appeal Cases, 337; *Scholes v. Brook*, 63 L. T. N. S. 837; *Le Lievre v. Gould*, L. R. (1893), 1 Q. B. 491.

TRUSTS — BANKS — NOTES FOR COLLECTION — INSOLVENCY. — Plaintiff bank sent the B. bank various claims for collection. After collection, and before remittance to plaintiff, the B. bank failed, and defendant was appointed assignee. Plaintiff sued assignee as a preferred creditor for the amount of the claims so collected, contending that the B. bank held them in trust. *Held*, that plaintiff should succeed. When a trustee mingled his own funds with those of trust property, the latter being actually represented among his assets, the beneficiary had a preferred claim for the amount of the trust. *Winstandley v. Second Bank of Louisville*, 41 N. E. Rep. 956 (Ind.). See NOTES.

TRUSTS — BANKS — NOTES FOR COLLECTION — INSOLVENCY. — Plaintiff sent a note to the J. bank for collection. When the latter received the note it knew itself to be insolvent, but collected the note before it went into the hands of defendant assignee. Plaintiff filed a preferred claim for the amount of the note. *Held*, that, as collection was made before actual assignment even though after known insolvency, the J. bank became a debtor, and plaintiff must come in with general creditors. *Sayles v. Cox*, 32 S. W. Rep. 626 (Tenn.). See NOTES.

TRUSTS — LACK OF BENEFICIARIES. — *Held*, that a bequest to a church, "to be used in solemn masses for the repose of my soul," is equally invalid, whether as a direct bequest to the church, or as creating a charitable use, or as creating a private trust, there being in the latter instance no living beneficiary. The court decreed that the sum should remain in the hands of the executors, although it defeated the testator's wishes, and although the church was willing to perform the intended trust. *Festorazzi et al. v. St. Joseph's Catholic Church of Mobile, et al.*, 18 So. Rep. 394 (Ala.). See NOTES.

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## REVIEWS.

THE PRINCIPLES OF EQUITY AND EQUITY PLEADING. By Elias Merwin, late of the Boston Bar, and Professor in the Law School of Boston University. Edited by H. C. Merwin. Boston and New York: Houghton, Mifflin and Company. 1895. 8vo, pp. xci, 658.

"The lectures which compose this book were delivered by Mr. Merwin at the Law School of Boston University," says Mr. H. C. Merwin, the son, in his Preface. "The author drew his illustrations chiefly, though by no means exclusively, from the English Courts, from the Federal Courts, and from the Supreme Court of Massachusetts," as was natural in a lecturer in the Boston University Law School. The "editors," however, of whom there were apparently others than Mr. H. C. Merwin, for the Preface mentions two other than he, have added in brackets the valuable



cases from other States, without descending to the collection of "all the cases." They have in addition amplified the text in places, as for example by the insertion of a long note condensing Messrs. Warren and Brandeis's article on Privacy in the HARVARD LAW REVIEW and the "Notes" which the REVIEW has since published supplementary thereto. The important case of *Schuyler v. Curtis*, dealing with rights to privacy, was decided after the publication of the book. By this amplification and the addition of American cases, the treatise has been made a fairly complete one, although its six hundred and fifty-eight closely printed pages scarcely seem to justify the claim of the Preface that it is a "short" one. The noteworthy and praiseworthy feature of the book, on the contrary, is that it treats voluminously — the text occupying an extraordinarily large proportion of the pages as modern law books go — almost every point in the law of equity which one might wish to turn to. Exactly what must be in a bill in equity, and what used to be necessary but now is not, are questions a full and ready answer to which is to be found at once here; in like manner the chapter on Mistake is full and valuable, and throughout the book the experience of the lecturer in explaining everything so fully as to make his hearers' understanding certain has been turned to good account for the benefit of the reader.

R. W. H.

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THE ORIGIN AND HISTORY OF CONTRACT IN THE ROMAN LAW. (Yorke Prize Essay for 1893.) By W. H. Buckler, B. A., LL. B., of Trinity College, Cambridge. London: C. J. Clay & Sons. 1895. pp. vii, 228.

Within the limits of 217 pages the author attempts to outline the history of contract in the Roman law down to the end of the Republic. His work, as he says in the preface, "professes only to be a sketch," and assumes that the reader is "familiar with the ordinary terms and rules of the Roman law." It is, indeed, a very brief summary, and does not go so deeply into the subject but that the average student of the Institutes may read it without difficulty. The first three chapters on the contracts of the regal period and the early Republic are quite well done, giving in narrow compass the results of the best German thought, and also some clever conjectures of the author. The remaining five chapters on the contracts of the later Republic, and especially on those of the *jus gentium* will scarcely be found very attractive or useful. They are full of names, dates, and edictal formulæ. Without attempting to get at Roman conceptions and theories of contract, the writer undertakes an inquiry into the age of each contract and its probable connection with previous institutions. If one would learn whether *societas* was actionable in the time of Plautus, or whether Cicero could have recovered in the *actio commodati*, one may find data for an opinion here. It is good to have these things put together in English, and the student who does not care to read the later chapters continuously will find a good index to guide him to what he seeks.

F. B. W.

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THE KING'S PEACE. By F. A. Inderwick, Q. C. London: Swan, Sonnenschein, & Co. Lim. New York: MacMillan & Co. 1895, pp. xxiv, 254.

Whatever a reader might ordinarily expect to find under the title of "The King's Peace," the sub-title in the present case, "A Historical

Sketch of the English Law Courts," leaves him no doubt as to the contents. In this, the latest volume of the "Social England Series," Mr. Inderwick has compressed into 250 pages an account of the origin, development, and modifications of the English courts. For lack of space, he has confined himself to a consideration of the so-called Superior Courts, and of the Chancellor's office. The Ecclesiastical Courts and the high Court of Parliament he leaves one side. The history of the courts, according to the author's statement, falls naturally into five periods of about 200 years each,—the Saxon period, from the time of King Alfred; that of the *Curia Regis*; the period from the division of the Courts in 1265, to the end of the York-Lancastrian wars; then from 1485 to the Restoration; and finally from Charles II.'s reign to the present time. But although particular features are characteristic of each period, these features fade gradually into those of the next, and the continuity of development is never interrupted. Like the law which was administered within their precincts, the very organization and functions of the courts were matter of growth. Custom, not statutes, accounted for the changes that crept in from time to time, even for the absolute discontinuance of certain courts and judicial offices. The change, for example, from the *Curia Regis* of one court to the three courts under Henry III. was accomplished without statutory help. And this development continued with practically no statutory innovation down to the time of the Judicature Acts of twenty years ago.

The book is delightful reading, and the many details and odd bits of information with which the author serves his readers testify to the excellence of his antiquarian researches. It is rather surprising, however, to find him giving full credence to "The Mirror of Justices" (p. 92), for its credibility has since been effectively impeached by Professor Maitland in his introduction to the recent Selden edition of the "Mirror." But Mr. Inderwick is not often at fault in antiquarian matters; and it is proof of the high estimate in which he is held that he has been selected by the Benchers of the Inner Temple to edit their archives,—archives which date from 1506.

E. R. C.

#### TEXT-BOOK OF THE PATENT LAWS OF THE UNITED STATES OF AMERICA.

By Albert H. Walker, of the Hartford Bar. Third edition. New York: Baker, Voorhis, and Company. 1895. pp. c, 751.

The third edition of this valuable and standard work contains many changes. There has been, however, as much condensation as expansion. Many of the unsettled questions discussed at length in previous editions have become finally and authoritatively adjudicated. In these cases the author has judiciously contented himself with a simple statement of the present law, and omitted all discussion. On the other hand, many new points have arisen in cases decided in the six years which have elapsed since the second edition of the book appeared, and these the author treats in the same ample lucid way which has been characteristic of his work heretofore. No better encomium could be desired than the authority accorded the book by the United States Federal courts. The citations of this work in the opinions of Federal court judges, almost equal the citations of all other English and American Patent Law text-books combined.

E. R. C.



# HARVARD LAW REVIEW.

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## THE ENGLISH STATUTES OF 1895.

FIFTY statutes are contained in five very thin numbers of the Law Reports for 1895, but most of them are so special that it is difficult to find any at all likely to interest the readers of this Review. An inexorable mandate has however been issued, and the attempt must be made.

The first statute requiring notice is the Shop Hours Act, 1895 (58 Vict. c. 5). The Shop Hours Act, 1892 (55 & 56 Vict. c. 62), § 3, forbade the employment of a young person in a shop for more than seventy-four hours a week, and § 5 imposed a fine for any employment contrary to the Act. § 4 provided that a notice should be kept exhibited by the employer in a conspicuous place referring to the provisions of the Act, and stating the number of hours in the week during which a young person might lawfully be employed, but imposed no penalty for the omission to affix such notice. § 7 provided that all offences under the Act should be prosecuted and all fines recovered in like manner as offences and fines were prosecuted and recovered under the Factory and Workshop Act, 1878; *i. e.*, on summary conviction before a court of summary jurisdiction in manner provided by the summary Jurisdiction Acts. In *Hammond v. Pulsford*<sup>1</sup> an attempt to enforce § 4 by means of the penalty under § 5, in a case where the actual employment was under seventy-four hours, not unnaturally failed. It was hinted by counsel, and apparently the proposition was adopted by the cur-

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<sup>1</sup> 1895 1 Q. B. 223.

rent legal papers and by the legislature, that there was no means of punishing a breach of § 4, that there was a slip in the Act, and a wrong without a remedy. The Shop Hours Act, 1895, was therefore passed with a view to remedy this defect, and a fine of forty shillings is imposed if the notice is not exhibited. Assuming, as one is almost bound to do, that the general view is correct, and that there was a *casus omissus* in the former Act, the point arises whether there is not a far larger defect in the general law of England, or at all events in that part of it which is administered by courts of summary jurisdiction. A statute orders a definite act to be done, which act concerns a certain part of the public. That act is disobeyed. Stephen's Digest of Criminal Law, Art. 134, states that "Every one commits a misdemeanor who wilfully disobeys any statute of the realm by doing any act which it forbids, or by omitting to do any act which it requires to be done, and which concerns the public or any part of the public, unless it appears from the statute that it was the intention of the legislature to provide some other penalty for such disobedience." No penalty being provided, the offender could, it would seem, be indicted for misdemeanor; and, by Art. 23, "Every person convicted of a misdemeanor for which no special punishment is provided by law is liable to fine and imprisonment without hard labor (both or either), and to be put under recognizances to keep the peace and be of good behaviour at the discretion of the court." The statute, however, unfortunately relegates the offender to a court of summary jurisdiction. This appears to have the curious effect of enabling it to be disobeyed with impunity. It certainly would be more consistent to give a general power to courts of summary jurisdiction to fine and imprison to a definite limited extent for offences which the legislature directs them to try without providing a special punishment.

The Army (Annual) Act, 1895 (58 Vict. c. 7), and the Appropriation Act, 1895 (58 & 59 Vict. c. 31), call for no special remark, but students of Dicey on the Law of the (English) Constitution may like to glance at Acts by which the Commons are enabled under a veiled threat of not passing them — that constitutional *διπλῇ μάστιγι τὴν Ἀρχὴν φιλεῖ* — practically to give the conventions of the constitution the force of law.

The Documentary Evidence Act, 1895 (58 Vict. c. 9), adds the Board of Agriculture to the Government Departments to which the Documentary Evidence Acts apply. (See Stephen's Digest of



the Law of Evidence, Art. 83, where the three methods of proof will be found.)

The Finance Act, 1895 (58 Vict. c. 16), makes a few alterations in the Stamp Act, 1891 (54 & 55 Vict. c. 39). Under the Stamp Act, 1891, a receipt written upon a bill of exchange or promissory note duly stamped, or upon a bill drawn by any person under the authority of the Admiralty upon and payable by the Accountant General of the Navy, was not liable to duty. In future it will be so liable, except in the case of bankers writing their names on bills or notes in their ordinary course of business, or payees of drafts payable to order signing the same. If a payee wishes for any reason to indorse a bearer check, it would be as well first to make it an order check. Where property is vested by an Act of Parliament, a Queen's printer's copy is to be stamped. If purchased under a statutory power, the instrument of conveyance is to be stamped. In each case, the stamped copy Act or the instrument is to be produced to the Inland Revenue within three months after vesting or completion, with a penalty for non-compliance. It is sometimes thought that railway companies and others who purchase property which they mean to hold permanently do not always take the trouble to stamp their deeds, and unless the deed has to be produced in court the Revenue loses the duty. In future they will have to exercise greater care on this point.

The Stamp Act, 1891, made life and accident policies of insurance include the well known newspaper advertisements in that behalf. The same principle is now to be applied to insurance against sickness or incapacity from personal injury. Formerly, when three months after the first execution of any instrument had elapsed, there was no power to remit stamp penalties. This limit is now abolished. This is perfectly right, as *bona fide* mistakes may be made and not discovered within the necessary three months. The Commissioners may quite well be trusted not to exercise their powers of remission unreasonably.

The Seal Fisheries (North Pacific) Act, 1895 (58 & 59 Vict. c. 21), is probably too well known in the States to require English comment. It is one of the many Acts in favor of a close time for seals, and applies to the animal known as the "fur seal," and to any marine animal specified in that behalf by an Order in Council under the Act. Presumably this means marine animals, *ejusdem generis*, and would not extend to whales, turtles, or sea-serpents, but the language is remarkably wide.

Under the Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24), a bailliff's certificate may be cancelled by a judge of the County Court that granted it, without the necessity of proving extortion or misconduct as heretofore. A person who distrains without a certificate incurs a penalty of £10, besides being, as before, liable for trespass, and if goods exempt from distress are seized they or their value can be summarily and quickly recovered, instead of being tardily replevied.

The Mortgagees Legal Costs Act, 1895 (58 & 59 Vict. c. 25), enables a solicitor mortgagee or transferee to charge profit costs. It was considered by the judges that, though such a solicitor mortgagee might add out of pocket costs to his security, he could not add profit costs; not because of any fiduciary relationship, but because the costs had never been incurred. The bargain was that the mortgagor might redeem on payment of principal, interest, and costs; i. e. costs incurred by the mortgagee which did not include remuneration for his own personal trouble.<sup>1</sup> The solicitor mortgagee could of course have employed some one else to do the work, and then the charges would have had to be paid, but if he voluntarily chose to do the work himself he was considered to do it as mortgagee, and not as mortgagee's solicitor. Rightly or wrongly, this was considered by the persons concerned as the acme of absurdity and the height of injustice, and in future the grievance will be removed. The mortgagee solicitor is to be looked upon as two persons, viz. a mortgagee and a solicitor, the former of whom can instruct the latter or his firm professionally, and the latter of whom, or his firm, can charge the usual profit costs. Without further detail it may be stated that the Act has removed the disabilities attaching to mortgagees from a solicitor's shoulders, leaving the rest of the community subject thereto. It seems quite clear that it has not removed the corresponding disabilities attaching to trustees; and now that a little correspondence has made this grave oversight plain to the profession, there is like to be a fresh outcry. It is so usual to have a special clause enabling solicitor trustees to charge profit costs even for work that would ordinarily be done without the intervention of a solicitor, that the chief effect of the new concession which is bound to come will simply be to save draughtsmen the trouble of inserting the clause. The clause in question often extends to all

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<sup>1</sup> See *In re Roberts*, 43 Ch. D. 52; *In re Doody*, 1893, 1 Ch. 129, and cases therein cited.



professional men, and no doubt the legislature will take that into account, and in a future Act enable all mortgagees and trustees whatsoever to make reasonable charges for work properly undertaken by them in some other capacity than that of mortgagee or trustee. It would certainly be unfair to allow a solicitor trustee and to forbid an accountant trustee to make his usual charges.

The Market Gardeners Compensation Act, 1895 (58 & 59 Vict. c. 27), is somewhat socialistic, and very much favors market gardeners as against their landlords. The Agricultural Holdings Act, 1883 (46 & 47 Vict. c. 61), giving compensation for improvements divided improvements into three classes: 1st, Improvements to which consent of landlord is required; 2d, Improvements in respect of which notice to landlord is required; and, 3d, Improvements to which consent of landlord is not required.

Needless to say, the present Act enlarges class 3. So far as market gardens are concerned, "erection or enlargement of buildings," "making of gardens," and "planting of orchards or fruit bushes," are removed from class 1, and an enlarged list is inserted in class 3. An incoming tenant could formerly purchase the outgoing tenant's right to compensation with the landlord's consent in writing. Such consent is no longer necessary. During his tenancy the tenant may remove fruit trees or fruit bushes planted by him and not permanently set out. The above provisions apply where, after the commencement of the Act, it is agreed in writing that a holding shall be let or treated as a market garden. Where a holding is, at the date of the commencement of the Act, used as a market garden with the landlord's knowledge, and the tenant has *then* executed thereon, without previous written notice of dissent by the landlord, any improvements in respect to which a right of compensation or removal is given by the Act, then the Act applies to the holding as if it had been agreed in writing after the commencement of the Act that it should be let or treated as a market garden. This seems to mean that user plus one such improvement executed before the 1st of January, 1896, brings the whole Act into operation without any consent on the landlord's part. If this is so, it is somewhat hard on the landlord, as he might have given a previous written dissent to the improvement had he known a future Act would affect him retrospectively. It would be fairer to confine the section to improvements executed after the 6th of July, 1895, when the Act was passed. Presumably, "then" means "at that date," and not "then or thereafter." In any case, however,

an improvement may quite well be made without any knowledge on the part of the landlord, and it seems strange to throw the onus of express dissent on him in such a case.

Under the False Alarms of Fire Act, 1895 (58 & 59 Vict. c. 28), the practice of ringing a street fire alarm wantonly will cost the practical joker £20. Under this statute, and two or three others of the year, the accused person and his wife are competent, but not compellable witnesses. This is a sort of tentative provision introduced into most new criminal or quasi criminal statutes, and if it is found to work well it will no doubt be made applicable to all criminal trials.

The Extradition Act, 1895 (58 & 59 Vict. 33), enables the Secretary of State to direct an extradition case to be heard elsewhere than at Bow Street in cases where the removal of the accused person is dangerous to his life or prejudicial to his health. The recent case of Dr. Herz shows the necessity of some such provision. Two more blows at the *Laissez faire* doctrine are dealt by the Fatal Accidents Inquiry (Scotland) Act, 1895 (58 & 59 Vict. c. 36), and the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37). The former provides for public inquiry in regard to fatal accidents occurring in industrial employments or occupations in Scotland. The latter amends and extends the Factory Acts. It is far too long to be dealt with here, but it may be mentioned in passing that it provides two hundred and fifty cubic feet of space for every person employed in a room, or four hundred cubic feet for over time, and if artificial light other than electric is used the Secretary of State may increase these figures. Dangerous factories and machines may be summarily stopped till the danger is removed, and in the case of machines *ex parte interim* orders can be obtained. Wearing apparel is not to be made, cleaned, or repaired in a house where there is small-pox or scarlet-fever. Fire escapes are to be provided. Young persons are not to be employed over time under § 53 of the Act of 1878, and women may only be so employed for three (instead of five) days in any one week, or thirty (instead of forty-eight) days in any twelve months. With so much just and proper legislation in favor of workmen, one might fairly expect to find some small provision for the protection of employers, such as, for example, a provision for the more speedy and effectual suppression of the gross abuses of picketing during a strike. If picketing within a mile of the factory were forbidden, and violence put down with a firm hand at



the outset, it would scarcely ever be necessary to call out the military to shoot unoffending people a mile away from the scene. It is really doubtful, considering the excellent half-penny evening papers, that so thoroughly understand and explain the causes of and remedies for each strike as it occurs, whether picketing is even necessary at all. Be that as it may, a free radius of a mile would not hinder its *legitimate* use, and some such provision would have relieved the year's legislation from a possible charge of one-sidedness.

The Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), greatly extends the jurisdiction of the magistrates and courts of summary jurisdiction under the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), and the Married Women (Maintenance in Case of Desertion) Act, 1886 (49 & 50 Vict. c. 52), the latter of which it repeals. The former Act gave the court power, where a husband was convicted of aggravated assault, and the court was satisfied that the future safety of the wife was in peril, to release her from cohabitation, order maintenance, and give her the custody of the children up to the age of ten. The Act of 1886 gave power to order maintenance in case of desertion, but, except by a meaningless marginal note, did not deal with the custody of children.

The present statute provides a remedy for any married woman who has not committed an act of adultery uncondoned, unconnived at, or unconducted by her husband, and whose husband is convicted of an aggravated assault on her, or convicted of assault on her and fined more than £5 or imprisoned over two months, or deserts her or is guilty of such persistent cruelty, or wilful neglect to maintain her, as to cause her to live apart. In such a case, she may obtain an order tantamount to a decree of judicial separation on the ground of cruelty, custody of the children to the age of sixteen, maintenance, and costs. The order will be discharged if the wife resumes cohabitation or commits adultery. By this provision, a certain *prima facie* danger of immorality arising from the statute is avoided. The statute is considered highly beneficial to the poorer classes, and probably its scope will sooner or later be extended to those matrimonial remedies which can at present only be obtained by those able to afford the luxury of an application to the High Court of Justice.

The next statute is the bar sinister of the year's legislation, being in effect a re-enactment of the ninth clause of the Decalogue.

It is a painful fact that, at the close of the nineteenth century, an English Parliament has found it necessary to pass a statute to prevent Englishmen making or publishing false statements of fact in relation to the personal character or conduct of Parliamentary candidates, without on reasonable grounds believing such statements to be true. By the Corrupt and Illegal Practices Prevention Act, 1895 (58 & 59 Vict. c. 40), this offence is made an illegal practice within the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), and a person found guilty is, on summary conviction, liable to a fine not exceeding £100, and for five years can neither be registered nor vote in the place where the offence is committed. Candidates found guilty on election petition are subject to further disqualifications. Injunctions may be granted. A candidate is not liable for statements unauthorized by himself or his election agent, unless his election was procured or materially assisted thereby. In the latter case, presumably, the candidate would merely lose his seat for that Parliament. It is to be hoped that this statute may soon become a dead letter for want of offenders, and that a future Parliament may feel themselves justified in repealing it.

The Naturalization Act, 1895 (58 & 59 Vict. c. 43), adds certain words to § 10, subs. 5, of the Naturalization Act, 1870 (33 & 34 Vict. c. 14), which will now read as follows, the additional words being printed in *Italics*: "Where the father, or the mother being a widow, has a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, *or with such father while in the service of the Crown out of the United Kingdom*, shall be deemed to be a naturalized British subject." The statute is properly made retrospective in its operation. The alteration speaks for itself.

With this statute a somewhat lengthy, and perhaps unavoidably dry, paper must conclude. The compression of statutes is such a dangerous task, that it is rash to hope all inaccuracy has been avoided. It is rumored, however, that Harvard students are trained from the outset of their course to look with distrust on anything but the *ipsissima verba* of the actual statute. Mistakes may amuse, but cannot mislead, such true worshippers at the shrine of their goddess, Law.

G. Rowland Alston.



## WHAT ARE DECREES IN PERSONAM?

FANCY an Englishman who owns the Vendome and concludes to buy the Brunswick also. Price is agreed, proper sale contract duly executed. The price is to be a million cash. Vendor's plans and programme for future business arrangements change of course; but the Englishman changes his notion, stays at home in London, runs his Vendome by agents, lessees, etc., becomes contrary and obstinate, and finally refuses to do a thing, and defies the vendor.

What can the vendor do about it? It is annoying to see his promisor and business rival enjoying the rents and revenues of a two-million-dollar hotel near by, without even sneaking its title into the name of a wife or brother-in-law, while said rival repudiates his contract duty, shelters his *personam* under the Meteor Flag, and enjoys full Massachusetts protection of his property. But what can vendor do about it?

The only complete justice for vendor is to get his price. Since *Old Colony Railroad v. Evans*,<sup>1</sup> a lawsuit will not give him the agreed million, but only a verdict for excess of price over value, no great sum when intelligent parties are dealing. We need not now speak of possible depreciations, so, if there is no jurisdictional stumbling-block in the way, vendor ought to have specific performance of the contract decreed by an equity court, and to have his contract price decreed to him, collectible by execution, for of course he will have attached the Vendome in his equity suit.

The attachment gives jurisdiction of the *lis*, opens a door to some possible relief. How much and what relief will depend upon how far the right arm of the Commonwealth reaches. Of that hereafter. We will suppose all the citations, etc. required by the equity rules in a suit against a non-resident duly given.

We may say, in passing, that it is the clear policy of the Commonwealth to aid its citizens against the misdeeds and defaults of foreigners to the utmost of its power. Its execution seizes the foreigner's property here, though the judgment has no extra-state force. Before a foreign guardian of a foreigner can carry off per-

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<sup>1</sup> 6 Gray, 25.

sonalty, he must get a license, which will not be granted if a citizen creditor object, and even a bonded resident guardian of a foreigner cannot carry off his personalty except on conditions imposed in Probate Court, after public notice, etc. Laws of personal arrest exist against a foreigner who "intends to leave the State." Non-resident executors, foreign express companies, insurance companies, etc., must have a resident agent to receive service of process. Support of a non-resident wife may be decreed here without any attachment.<sup>1</sup> If a foreigner has or pretends a cloud over Massachusetts land, our courts dissipate the cloud, without any personal jurisdiction over or service upon the foreigner.<sup>2</sup> They sequester unattachable property of a non-resident in favor of a citizen creditor. The Legislature has also invented a conveyance by "a suitable person" under direction of an equity court when a foreigner has any interest in any realty or personalty, a wood-lot or a cow, which by any trust express, written or oral, or even only implied, ought (or any interest therein) to be conveyed to a citizen (P. S., ch. 141, sec. 22). Further illustration is not necessary. It is plain that every effort should be made to aid the citizen against the wrong-doing foreigner.

If our client were vendee of the Brunswick and held the Englishman's bond to convey him the hotel, vendee would succeed under the above section 22, and the "suitable person" would execute a deed to him.<sup>3</sup> But the court does not think a vendor can get relief under section 22.

Does he need it? He now holds the whole legal title to this Massachusetts hotel, and has facilities which a vendee has not. He does not need to ask so much of the court. Perhaps he can be helped to what is right and equitable without any decree *in rem*, and without any decree ordering the Englishman's *personam* to do anything. Perhaps his own full legal title may be modified, marshalled, or conveyed, he being willing and ready so to do. Perhaps such modification may be offered or tendered, which is all equity would seem to care about, so as to accomplish all the equitable preliminaries that a vendor ought to offer in order to entitle him to an execution for his cash price. There is no doubt that the Commonwealth dealing with its own land can authorize such tender in a bill in equity against an absent foreigner, and make it equivalent to full performance by vendor of all preliminaries due from him.

<sup>1</sup> Blackinton v. Blackinton, 141 Mass. 435.

<sup>2</sup> Felch v. Hooper, 119 Mass. 52.

<sup>3</sup> Short v. Caldwell, 155 Mass. 57.



It does not follow that her courts can. They may have no equitable jurisdiction at all, so we have to inquire whether the vendor's own control of the legal title suffices. He therefore brings his bill, not for legal damages, but for true equitable relief, *viz.* full specific performance, tenders in his bill, and places on file a correct deed of the Brunswick, asks the approval of his action by the court as and for a performance on his part of his whole duty, and an order of execution for his price. Such approval must be by decree, and we are brought to the question whether this decree is objectionable as being *in rem*, or as being such a decree *in personam* as must not be made against a foreigner.

Well, it is not *in rem*. The court conveys no title. The plaintiff alone does whatever looks in that direction, and places with the clerk the title of the Brunswick for the acceptance of the Englishman. The court merely inspects, sees that the plaintiff is fairly doing what devolves upon him to do, as it would verify the performance of any other preliminaries, puts its determination in form of a decree, orders the clerk to hold the deed for defendant's acceptance (if he ever claims it) and to issue execution for the cash. Perhaps the title does not pass at all. Perhaps it never does by any tender. It is not material to the principles of equity that the title should actually vest in the Englishman, but it is material that the plaintiff should do his duty by tendering. The actual title might not pass if the foreigner had been caught on the wing in a transit across Massachusetts by a personal tender and citation. Yet in that case the court would certainly act, and its jurisdiction over subject and person would be unquestioned.<sup>1</sup> Jailing for contempt is not accepting the filed deed, and is not available after the foreigner's aforesaid transit has been completed. In short, does equity really care whether he accepts or not? We will inquire by and by. But in *Merrill v. Beckwith*,<sup>2</sup> the court considered that it could not "compel him to accept a conveyance," and, the suit being *in personam*, "could not bind him personally by its decree."

This brings us before long to the question of much practical interest to vendors: Is any acceptance necessary? Is any decree to accept necessary? Is it necessary to bind the foreigner personally to anything in our hotel suit brought by a vendor?

We shall not discuss suits to compel a foreign vendor to execute a conveyance, which would be an act of power *in personam*, and to

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<sup>1</sup> *Thompson v. Cowell*, 148 Mass. 552.

<sup>2</sup> 163 Mass. 505.

compel action, activity, *in personam*. Such cases are *Spurr v. Scoville*,<sup>1</sup> *Moody v. Gay*,<sup>2</sup> etc. We discuss only a vendor's bill, and no action or signature of defendant is wanted.

It is true that no decree *in personam* can be made when there is such jurisdiction as the Vendome attachment gives? Is it not more scientific to say that no decree compelling activity of the foreigner can be made? Is there not in this regard a vital distinction between decreeing against a defendant who is to be passive and one who is to be active? In *Spurr v. Scoville* he would have to be active, i. e. execute and acknowledge a deed, and Judge Fletcher there says the court will, if there are other parties in same cases "proceed against those other parties, and if the absent parties are merely passive objects of the judgment, a complete determination may be obtained." Sir Thomas Plummer<sup>3</sup> says: "Not having them before the court, *though their rights may be bound*, there is a difficulty in making them act. The plaintiff requires specific performance of the agreement, supposing it proper for a few to execute the lease in behalf of the rest. In a conveyance of the interest, all must join. But that difficulty presents no objection to *binding the rights of the parties not before the court*. That is authorized in every one of the cases referred to. If the court cannot proceed to compel the defendants to do the act required, it must go as far as it can." This is the doctrine of Judge Story<sup>4</sup>: "The absent party cannot be compelled to do any act. But if the disposition of the property in controversy is in the power of the parties, the court may act upon them and through them upon that property." And in *Fell v. Brown*<sup>5</sup> the Chancellor says: "I admit the distinction has been taken as to proceeding in the absence of parties abroad, between their being active or passive parties." Well, our vendor is content to have the Briton passive, — under the court's approval puts his deed of the Brunswick on file for defendant's acceptance, — asks no decree which shall make the defendant act, sign, or do, only a determination by the court that vendor has done his duty, and its permission, not order, to defendant to take the deed from the clerk; and all this not as a record to have extra-territorial force, but as a determination of preliminaries to the end that a cash execution against attached Massachusetts property may issue.

By English practice this can be done, the hotel being within

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<sup>1</sup> 3 Cush. 578.

<sup>2</sup> 15 Gray, 457.

<sup>3</sup> *Meux v. Maltby*, 2 Swanst. 277.

<sup>4</sup> Eq. Pl., sec. 81-87.

<sup>5</sup> 2 Bro. Ch. 276.



jurisdiction, and a citation to be served out of jurisdiction is allowed. Judge Aldrich calls this practice an improvement upon ours, and thinks "it would be no great enlargement of the rule of relief laid down in *Felch v. Hooper* against a foreigner, for the court to decree, in accordance with the English rule, specific performance of a contract concerning land within jurisdiction, although the defendant should be out of jurisdiction and never had been within it."<sup>1</sup>

Some questioner may ask, "Does all this transfer the Brunswick title to the Englishman? Can a man be made a landowner without his acceptance?" We have alluded to this, and should even incline to agree with the questioner, but shall not do so quite yet, because of the opinion of Shaw, C. J., in *Concord Bank v. Bellis*<sup>2</sup>: "A good conveyance may be made by deed poll to an infant, lunatic, or feme covert (1852), although such grantee would be under legal disability to convey. It is true that in theory of law the grantee in a deed poll is held to be a party by accepting the deed, but the deed does not derive its efficacy as a grant and conveyance from the act of the grantee in accepting, but from that of the grantor in executing it. In case of a plain, absolute conveyance without conditions, either no special acceptance is necessary to give it effect, or what is nearly the same thing, the acceptance of the grantee will be presumed. So the delivery of the deed to a third person (the clerk), unconditionally, for the use of the grantee, gives effect to the deed."

But was it ever supposed that the actual acceptance by a recalcitrant vendee of a tendered deed was an essential preliminary to the enforcement of vendor's rights? If so, farewell to all redress against foreigners; — yes, and frequently against citizen vendees too, for they can leave as the decree approaches, or if in jail for contempt still refuse to accept if sufficiently angry. The court cannot compel acceptance by the foreigner, — it can only permit. Even where personal citation is made (on the foreigner in transit) and when the personal jurisdiction is clear,<sup>3</sup> all attempt to compel acceptance would be futile. Did any one ever hear of a court trying to compel actual acceptance by foreigner or citizen of either deed or money? Does any one care whether he accepts or not? Certainly phrases occur about "compelling acceptance,"<sup>4</sup> and we

<sup>1</sup> Aldrich, Eq. Pl. & Pr. 44-46.

<sup>2</sup> Thompson v. Cowell.

<sup>3</sup> 10 Cush. 278.

<sup>4</sup> Richmond v. Gray, 3 Allen, 27-31; Park v. Johnson, 7 Allen, 383.

cannot tell whether they mean any more than a *forma arguendi*, for it is the relief to a plaintiff that is argued about. Such expressions, or order that a defendant accept something, may have even crept inadvertently into some decrees for specific performance, and would carry little weight; but in a cursory search we find few such, and their absence in others is very significant. In Seton, 696, plaintiff purchaser is decreed to be "at liberty to pay into court — pounds to the credit of the cause," and the premises shall be conveyed to him. That is all. The leading case, *Felch v. Hooper*, which reached a decree in 4 Clifford, 493, does not compel defendant vendor to accept the money, and there is no more legal need for vendee to accept a deed than for a vendor to accept the money. In the statute, P. S., ch. 141, sec. 22, under which *Felch v. Hooper* was decided, there is no anxiety manifested that the foreigner shall accept the money due him by the enforced contract, nor any means provided for the court to make him do so, and the court does not try to, but of course, as of simple equity, requires the plaintiff to deposit it, and would permit defendant to take it. It must do this much to do equity, and in such permissive decree makes no decree inadmissible *in personam*, violates no constitutional rights of the non-served non-resident, and no greater decree than this is wanted in our Brunswick case. Would it not be rather ludicrous for an equity court to distress itself, whether the foreigner ever did take the deed or the money from the clerk? Would it not be a grave defect in the administration of equity to suffer his neglect so to do to bar the rights in Massachusetts land of a vendor who has done his whole duty? The text-books say that even inability of vendor to make perfect performance shall not bar the plaintiff's right to an imperfect performance if he wants it. The default, inability, or refusal of a defendant must not prejudice the plaintiff. In brief, the cause invokes relief for a plaintiff. He alone prays any. Of course he must do equity, that is, if vendee, pay into court, — if vendor, file a deed; and it is wholly immaterial whether the defendant ever accepts either, — from which it follows that a decree against the Englishman should not order him to accept the deed. The court is merely requiring a plaintiff "to do equity," and, if there be no court or case, the plaintiff has done his duty when he tenders a correct deed.

It would seem, then, that in our Brunswick case, and also in cases of personal citation, the decree should not "compel ac-



ceptance" by the defendant; and the quoted remarks of the distinguished jurist in *Merrill v. Beckwith*, though weighty of course, are too brief to be a discussion.

The questioner may still say, "But passing the question of compulsory acceptance, has the court any jurisdiction even to say that the uncited foreigner *ought* to accept and perform?" The answer is, "Yes, just so far as the attached Vendome represents him,—just so far as at law to say he ought to pay a debt out of the attached property."

But Judge Fletcher (*Spurr v. Scoville*) says, "The person named as defendant is not before the court, nor within its jurisdiction, and the attachment can avail nothing in this case." That was so because the relief sought there was to compel a defendant to execute a deed. But is it true that, where an attachment of the Vendome exists capable of satisfying the whole equitable claim for the cash relief, that there is no *lis pendens* at all? If so our contention is extinguished. Has the court no power to help the plaintiff? If so, why our attachment laws and provisions for constructive notice to absent defendants? How is it at law in the collection of debts against foreigners? Is there really no *lis*? A lawsuit is started on a foreigner's bond, his realty attached, and the statute notices duly given. He is defaulted. Why? Judgment for the penal sum for breach of the bond is entered upon said default. Then follows an *ex parte* hearing to see how much "equity and good conscience" shall say ought to be paid. Here is a jurisdiction concerning the absentee's duty. This hearing is by the court, and sometimes by a jury, if anybody wants a jury, and later execution is awarded. All this looks like a *lis pendens*. It is a *lis pendens*, with the peculiarity that the relief is enforceable only out of the attached property. It is not a proceeding *in rem*. The *res* is the Brunswick. The attachment is on the Vendome. Thus there are judgments *in personam* which are unobjectionable, even if the *persona* is out of jurisdiction. So there are equity decrees against foreigners equally unobjectionable; e. g. in case of attachment of property here belonging to a foreign trustee of cash funds. The lawsuit above is then a suit *in personam* with relief qualified. The names of two parties appear in the docket and record. In *Boyd v. Urquhart et al.*, Judge Sprague styles the proceeding "a libel *in personam*." No process on *Urquhart et al.* was served, as they were out of jurisdiction. An attachment of a vessel was made. Judge Sprague says it is no process *in rem*, and he ascer-

tained the amount due libellant, and ordered it paid out of the attached property, and costs too.<sup>1</sup>

All these advantages and means resulting from attachments are by statute available in an equity suit. Sometimes they will suffice for full relief, as in our Brunswick case, and relief of an equitable nature, viz. price, not damages. Of course in *Spurr v. Scoville* they would not, but it will never do to say that our vendor attaching the Vendome has not a *lis* in which something can be done, nor to say there is no jurisdiction. Clearly there is a qualified jurisdiction explained in *Boyd v. Urquhart* and in *Eliot v. McCormick*,<sup>2</sup> and the citizen has the right to have it exerted if and when it will avail him. If he were suing on a bond as above, all the preliminaries, "equity hearing" and all, will be determined by the tribunal before ordering execution. If his suit is in equity against the Englishman vendee, all the steps — style of deed, approval, order that the clerk hold it for defendant's use, etc. — should be passed upon by the court's decree, as in ordinary suits against a cash vendee. Nothing is required or compelled from the activity of the foreigner, and finally execution for the contract price is ordered and exact relief attained. Here the attachment jurisdiction is not futile and irrelevant, as in *Spurr v. Scoville*, but real and complete. Is not this programme sound in principle?

T. M. Stetson.

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<sup>1</sup> Sprague's Dec. 423.

<sup>2</sup> 144 Mass. 10.

NOTE. — A glance forward indicates that the above doctrine may perhaps have wider application than to sales for cash. Most sales of realty contemplate a return mortgage of it, and it may be thought difficult to compel a foreigner (without personal service) to execute such mortgage. But the deed poll of the above article is to conform to the contract of sale. Properly drafted, it can create in favor of the grantor a lien for the purchase money exactly identical with a mortgagee's lien or title. In fact, such is a favorable method in several States for creating the desired status, viz. converting grantor into a mortgagee, and grantee into a mortgagor. The lien thus reserved to grantor is declared by Mr. Justice Bradley to "equal a mortgage taken contemporaneously with the deed, and nothing more, and the purchaser has the equity of redemption precisely as if he had received a deed and given a mortgage for the purchase money." *King v. Y. M. A.*, 1 Woods, 386. The name of the topic in the books relating to this mode is "Vendor's Lien by Contract or Reservation." See Jones on Mortgages, sec. 229-240, *Ogden v. Ogden*, 4 Ohio St. 182, and the situation "differs in no respect from a technical mortgage." The formal variation from the mortgage signed by vendee to such deed poll is justified by defendant's breach of contract, and is in no sense material in equity. It is formal only, and changes even of substance are often justified in cases of specific performance where the doctrine of *cy pres* prevails, as well as in charity cases. (See many cases in Fry, S. P., sec. 667-674.) Such deed poll is an equitable equivalent for the deed and mortgage, just as in a contract of sale, where vendee is to give back a lease for one year, the deed poll may reserve the one year use.



## JUDICIAL REPEAL OF THE STATUTE OF FRAUDS.

THE Statute of Frauds is ostensibly a measure to prevent frauds, whether the frauds be intentional, through the medium of false swearing, or accidental, as the result of defective memory. In either view of the matter, the statute is remedial, and is generally professed to be construed, as it should be, to effectuate this purpose. Its provisions are readily observed, and through all the years that it has been upon the statute-book it has undoubtedly proved to be a great instrument of justice. But courts sometimes yield to the appeal made to their sympathies by the exigencies of special circumstances, and in this way there has gradually developed upon this "bulwark of jurisprudence" a parasite, strangely coddled and nurtured by judges, who have allowed themselves from time to time to be carried away by prejudice from these special circumstances. And then the plain terms of the statute are ignored, and the very wholesome purpose of its enactment disregarded. This parasite is the so called doctrine that inasmuch as the statute was intended to prevent frauds, and not to assist in perpetrating them, it should not be allowed to become, according to the now popular phrase, an instrument of oppression, instead of one of defence. It will be found that this backsliding has led to numerous distinctions and exceptions, by which the beneficent aims of the statute have been often neutralized, and its very design often frustrated. These lapses are generally to be found instanced in cases where one of the parties to a contract has partly or wholly performed his part of the oral agreement, so that, if no remedy at all were provided for the party performing, the party receiving the benefit of this partial or complete performance would be said to use the statute as an instrument of oppression to retain his advantage, and therefore, it is argued, the statute should not be allowed to be interposed as a defence at all. The readiest answer to such an argument is, of course, a reference to other instances, where the law, as a matter of policy, considering only the greatest public benefit in the largest number of cases likely to arise, permits of defences that under exceptional circumstances appear arbitrary and selfish, and that also may permit to the

defendant the retention, without compensation, of some advantage received from the plaintiff, and to secure which compensation the plaintiff has neglected some precaution. Apt illustrations of this argument are found in the defences allowed by the Statute of Limitations and the Usury Laws. But we have not yet come to the point of claiming that these statutes shall not be used as instruments of oppression, no matter what advantages are obtained by defendants in pleading them.

As an example of the charge that courts are falling away from the letter as well as the spirit of the Statute of Frauds may be cited the ordinary case of an express oral contract of employment, which, by its terms, is not to be performed within a year of its making, where the employee has entered upon the service and has partly performed it. Here, it is sometimes argued that the employee should be allowed to recover damages, as for a breach of the express contract of employment, whether the wrong complained of be the non-payment of wages or the wrongful discharge. This doctrine of part performance can hardly be said to have yet been generally established. The courts seem rather to be tending to this point, than to have yet thoroughly attained it. But there are certainly some decisions and numerous dicta to this effect, and the progress towards the adoption of the doctrine is probably being made unconsciously. There is danger that, if the true student of the law do not seasonably protest, we shall have a repetition of the development of the law of contracts made for the benefit of third persons, where it was suddenly realized that we had outgrown the necessity of privity, and a doctrine that is unsound and impossible to accurately determine has come to the point of being almost universally acquiesced in. The Statute of Frauds declares that exceptions shall be made in the case of contracts for the sale of personal or real property, to the extent that certain kinds of part performance shall take the contracts out of the statute. This must be deemed a declaration that no other kind of part performance shall have that effect as to such agreements, and no kind of part performance as to any others.

It is sometimes contended, by way of apology, that the greater number of instances in which part performance on the part of the plaintiff has been permitted to take the case out of the statute are to be distinguished on the theory that a debt had been created by this performance, or, as it is sometimes said, a condition has been brought about from which the law will imply the promise to pay,



unaffected by the statute. That is to say, the statute continues to be a prohibition so far as the express contract is concerned, but an obligation is created, in order, as it were, that equity may be done, as in the case of the so-called equitable action for money had and received by the defendant to the plaintiff's use, which the law then, whether he will or no, makes the defendant promise to pay to the plaintiff. It is always a strange spectacle to see the law protect a plaintiff against the consequences of the law, for that would seem to be the effect of implying a contract, where one has been expressed, that through the fault of the plaintiff himself is not enforceable. It is the case of a statute shocking the conscience of the Chancellor. In another branch of the law we find the time-honored maxim that the expression of one thing is the exclusion of every other. If, then, the parties to an express agreement enter upon its performance, even though by the terms of the statute the agreement be not enforceable, how is there room for the presumption that the parties have made for themselves some other and different agreement than the actual one expressly made? But then this may be only another of our legal fictions; a trick to evade the law. The only answer made to this objection is, that the recovery is on a promise implied by law, and not on a promise implied in fact, which may be a distinction without a difference.

The question then arises as to what shall be the form of the agreement that is implied. It is said in many jurisdictions that the terms of the express agreement are competent evidence on the question of the extent of the implied obligation; the rule being differently stated by different courts. Sometimes it is said that the terms of the express agreement *tend* to prove the extent of the obligation imposed upon the defendant by implication of law; at others, that they prove it *prima facie*, and again at others, that they prove it *conclusively*. It would seem, however, that none of these theories can be maintained in principle without entirely losing sight of the purpose of the statute. If the express oral agreement is condemned by it, in order to exclude parol testimony of its terms, as exposed to the danger of perjury or defective memory, why should parol testimony as to its terms be admissible for any purpose? Where it is, sight is lost entirely of Lord Holt's reminder, that the design of the statute was not to trust the memory of witnesses beyond one year. It must not be supposed, however, that this heresy in any form is accepted in all jurisdictions, for there are some courts that still hold any evidence of the express con-

tract to be incompetent for every purpose. Indeed, in some States, the very terms of the statute would seem to cover the point, the provision being not only that certain contracts not evidenced by certain written forms shall be deemed invalid, but, in addition, that no oral evidence of their contents shall be introduced. Thus, for instance, the Civil Code of California (Section 1624) declares that "the following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing," etc. The Code of Civil Procedure of the same State (Section 1973), in that part of the Code which is supposed to represent a Code of Evidence, provides that "In the following cases the agreement is invalid, unless the same, or some note or memorandum thereof, be in writing," etc. "Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents." But I do not know of any case that raises the question in that form.

A rather curious distinction is suggested in the case of *Kimmons v. Oldham*,<sup>1</sup> where plaintiff and defendant were stockholders in a Turnpike Company, and agreed orally with each other that plaintiff should raise money for the use of the company on his own note, payable after a year, with the right to look to the defendant for contribution. The note was given according to agreement, and paid at maturity, and to the action to compel contribution the defendant pleaded that the contract was oral, and one which by its terms was not to be performed within a year. Plaintiff insisted that there had been part performance. Indeed, although it was characterized by the court as a case of part performance, it was in fact one of complete performance on one side, but no point seems to have been made of that. The court repudiates the doctrine of part performance for all actions at law, and as to suits in equity restricts the doctrine to bills for the specific performance of contracts for the sale of land, saying, incidentally, that when the failure to complete contracts of sale would operate as a "fraud," (here is an earmark of the heresy,) courts of equity may exercise a similar jurisdiction as to chattels. "One who has rendered services in execution of a verbal contract, which, on account of the statute, cannot be enforced against the other party, can recover the value of the services upon a quantum meruit." This doctrine, says the court, is not universal in its application, but is limited to cases in which the goods delivered, consideration paid, or services rendered

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<sup>1</sup> 27 W. Va. 258.



*inure to the benefit of the defendant.* (Emery v. Smith, 46 N. H. 151, Acc.). Here, then, is a further ground of distinction, which, under the particular clauses of the statute that are applicable, seems to be unique. The implied promise to pay is not commensurate to what is given or done by the plaintiff, but to the direct benefit derived by the defendant himself; for, says the court in the same action, in sustaining the defence, the entire benefit of the payment made by the plaintiff inured to the benefit of the Turnpike Company. The plaintiff cannot recover upon the oral agreement, and the law will imply no promise on the part of the defendant to pay for what is not beneficial to him. "But if such promise could be implied, it would simply be a promise to answer for the debt of another, and would be void under the statute." (Query, Is not the benefit to the corporation a benefit to the stockholder?) Here again we have an illustration of the struggle of the courts to circumscribe a fallacious innovation, grafted upon the sound legal notions that are bred in the judicial bone.

When, however, we come to the case of contracts within this statute that have been wholly performed on the part of the plaintiff, we find, apparently, a preponderance of respectable authority on the side of the doctrine that the case is then taken entirely out of the statute. And this, too, in jurisdictions where the theory that part performance would have a similar effect would not be entertained for a moment. It might perhaps be urged at the outset, that, considering the theory of the statute, there is no difference at all, in principle, between complete and partial performance. Indeed, if on December 1, 1894, a contract of employment be made for one year, to begin on January 1, 1895, under which the employee is discharged on March 1, 1895, after he has served for two months without compensation, it would seem that there would be much less danger of defective memory, of unfaithful recollection as to the terms of the oral agreement, in a suit brought promptly by him after his discharge, than if he had served the full year and then been compelled to sue for his wages. And yet, probably, the weight of authority is in favor of sustaining an action on the express agreement in the latter case, and against sustaining it in the former case. This amounts to saying, still following the favorite expression of the courts, that to plead the Statute of Frauds in the case of complete performance is to use it as an instrument of oppression, while to plead it in the case of part performance is to interpose a shield against fraud and perjury. What

difference between the two cases is there but one of degree, and is it not true that the danger of false swearing is increased in proportion as the period of proving a contract by parol evidence becomes more remote?

The better doctrine would seem to be the one tersely stated in *Broadwell v. Getman*.<sup>1</sup> "An agreement is an entire thing, and where it cannot be completely executed on both sides until more than a year has elapsed, the case falls within the express words of the enactment. It is also within its spirit, for the mischief meant to be prevented by the statute was the leaving to memory the terms of a contract for a longer time than a year." And the true doctrine must be that an agreement, the whole of which cannot within a year be performed according to its terms, is within the statute, even if the act or promise, which is the consideration for the defendant's undertaking, may be or has been actually performed within the year.<sup>2</sup> The statute does not refer to agreements neither side of which can be performed within a year, so that the force of a learned commentator's distinction is not apparent when he says that, "in all the cases where the agreement has been held to be within the statute, the action was for the breach of that side of the contract that was not to be performed within the year."<sup>3</sup> This seems like an undue concern to vindicate the opinions of some of the courts; for except in the case of unilateral agreements (where the words "promise" and "agreement" are synonymous) this distinction appears to confuse the word "agreement," which is used in the statute, with "promise," which is only one side of the agreement. The distinction would of course be sound if the statute referred to "promises" not to be performed, etc., instead of "agreements." And whether the obligation rest upon an executed or an executory consideration, the danger of allowing its terms to be proved by parol evidence at remote periods is precisely the same.

These various refinements, distinctions, and exceptions also sorely puzzle the minds of other commentators, and when they endeavor to arrange the rules in an orderly system, they are led to strange incongruities. Thus, for instance, Reed, in his *Treatise on the Statute*, after commenting despairingly on the conflict of authority and lapse from principle, sums up with the statement that "The preponderance of American authority cannot be easily

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<sup>1</sup> 11 Denio, 88.

<sup>3</sup> Browne on Statute of Frauds, p. 352.

<sup>2</sup> *Lapham v. Whipple*, 8 Met. 59.



ascertained. It probably leans to the view that denies to anything less than complete execution of both sides of the agreement the effect of satisfying the statute." It occurs to one, however, to inquire how any question can arise under the statute, that is to say, how any question can arise in a practical form in a judicial proceeding, when both sides of the agreement have been performed. Nevertheless, it is the fact that there have been such cases involving the question, and the apparent paradox disappears.

In *Adams v. Fitzpatrick*,<sup>1</sup> it was fairly held that a contract, originally void under the Statute of Frauds, becomes valid upon performance. Plaintiff had contracted to enter defendant's employ for a period in excess of a year at a certain yearly salary. The contract was oral, but fully performed on both sides. Thereafter plaintiff continued in the employ of the defendant without any contract, for a period less than a year after the expiration of the original term, and until he was discharged. The court held that by the acquiescence of the parties, and by implication of law, the contract was to be deemed renewed for one year on the same terms as the oral contract, which, it was conceded, was within the prohibition of the statute. Says the court, "It is true that the original contract, so long as it remained executory, was void and unenforceable; but having been voluntarily performed by both parties, neither could afterwards be heard to allege its invalidity, and it controlled the terms of service and compensation under it as against both parties, as well as afforded an authority from which the intention of the parties in relation to a further contract could be inferred. In other words, after execution, it was to all intents valid." The same conclusion was arrived at in *Tatterson v. Suffolk Manufacturing Co.*,<sup>2</sup> where the court says that, "The terms of the contract, in the absence of express words, are to be ascertained not alone by what occurred within the year, but also from all that had transpired previously."<sup>3</sup>

And here, again, we find the courts forgetting the salutary reminder of Lord Holt, that the design of the statute was not to trust the memory of witnesses beyond one year, for the plaintiff is not restricted to showing what happened during the year of performance, but is permitted to show the terms of the original oral agreement, which will have been made more than a year before evidence of its terms can possibly be offered.

<sup>1</sup> 26 N. E. Rep. 143.

<sup>2</sup> 106 Mass. 56.

<sup>3</sup> *Sines v. Superintendents of the Poor*, 58 Mich. 503 (Acc.).

These three decisions suggest a curious question, that might arise under the statute in those States in which the statute simply makes certain agreements invalid, without expressly forbidding the introduction of evidence as to the terms of the agreement. Let us suppose a case where A., on November 15, 1893, makes with B. an oral agreement for B.'s employment for one year, to commence January 1, 1894. On January 1, 1894, B. enters upon the performance of this agreement. On January 15, 1894, B. says to A., that inasmuch as the agreement of November had not been reduced to writing, he wishes it confirmed now that the year had begun to run, and so as to take it out of the statute; to which A. replies that that is satisfactory to him. In fact, the terms of the original oral agreement are not fully rehearsed in this conversation. B. is discharged without cause, and sues upon the agreement as made in January, 1894. To prove its terms he offers testimony as to both negotiations, the one of January 15, 1894, as well as that of November 15, 1893. Is the evidence as to the earlier agreement competent, as against the objection that it was not to be performed within a year, and should therefore have been in writing? This is of course not the common case of reference to some other writing in the written memorandum mentioned in the statute. The statute, let it be remembered, does not require the agreement itself to be in writing, for it sanctions the alternative of "some memorandum thereof," etc.<sup>1</sup> The agreement of January 15th is of course valid, for aught that the Statute of Frauds provides, but how shall its terms be proved? It would seem that to permit parol evidence of the oral agreement of November to be introduced (and that proof is necessary to make it sufficiently definite to be enforceable) would bring the case within the mischief, if not the letter of the statutory prohibition. And yet it is not at all clear that the New York, Massachusetts, and Michigan courts, which decided the above three cases, would so hold, if the question came before them.

The jurisdiction of courts of equity, in cases of actual fraud, may be admitted, both on principle and authority, to be ample and sufficient, and whether the Statute of Frauds or any other be involved. But the statute itself is as binding on a court of equity as on a court of law. The mere moral wrong of the defendant in interposing the defence of the statute (if the idea of immorality can ever be predicated upon the assertion of a legal right) cannot

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<sup>1</sup> *Leroux v. Brown*, 12 C. B. Rep. 801.



by itself justify the interference of, or confer jurisdiction on, a court of equity. Circumstances might perhaps be conceived, in which, by intentional misrepresentation or other fraudulent conduct, compliance with the requirements of the statute has been prevented; but these are not the cases of part performance or complete performance of one or both sides of the contract that have been criticised. There should be, it would seem, in addition to the part performance, something in the attending circumstances to constitute a case of legal fraud.

It may be admitted that, if laws that do not approve themselves to the judgment of the executive are properly allowed to become a dead letter, courts may be excused for emasculating objectionable legislation. But so long as the aims of the Statute of Frauds continue, as they undoubtedly should be, to be regarded as beneficent, no excuse is apparent for repeal by indirection.

*Fesse W. Lilienthal.*

## JUDICIAL CONFLICT. — MISTAKE IN BOUNDARY LINES.

THE subject of the conflict of judicial opinion considered in its general features, apart from a discussion of any particular line of decisions, presents a field of inquiry to the student at once interesting and instructive. Is it the tendency of our modern systems of practice to increase or to lessen the chances that two courts of last resort will decide contrariwise? Do these conflicts recur with such frequency and in such circumstances as to suggest the possibility that perceptible causes are operating to bring them about? In other words, are they capable of being referred to a rule, however much that rule may lie open to exceptions?

To seek to uncover and register with some degree of precision the various influences that are at work shaping the conclusions of the judicial mind, besides the force of legitimate argument addressed to it at the bar, is to enter upon a hopeless task. The acutest judge himself would fail in the attempt. But it is by no means impossible to point out here and there signs of an active influence whose effect may be visibly traced, even if it cannot be reduced to exact terms. These motives, to be sure, are not unworthy, nor are they entertained consciously. Promptings do nevertheless exist that operate with more or less cogency, ranging as they do all the way from a personal bias to those prejudices of race, religion, or locality which an occupant of the bench shares with the community around him. The presence of such factors, subtle as they may be, does not escape the attention of the experienced practitioner. Indeed, a capacity to detect their agency, and aptly to turn them to the advantage of his client, has much to do with a lawyer's success in the trial of causes.

We are inclined to think that it ever remains a mystery to laymen why there should be such frequent diversity of views among judges as to what the law really is.<sup>1</sup> Clients are not altogether satisfied, nor are they much comforted, when, after a case is lost,

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<sup>1</sup> A curious instance where a case is twice decided, and decided differently, with no reference in the latter opinion to the former decision, is *Elliot v. Stone*, 12 Cushing, 174, and 1 Gray, 571.



they are told by counsel that the judge who dissented is not only right, but that his opinion is abler and more logical by far than that of the majority of the court. If the law is so plainly on his side, how comes it that most of the judges are blind to the fact? Lawyers are not in the least surprised at all this. They are accustomed to see not only members of a single court divide upon question after question, but also a steady current of diverse opinion maintained from time to time between the courts of different States, as well as between appellate tribunals, State and Federal.<sup>1</sup>

Of course, for the most part these differences yield readily to explanation. In fact, it is easy to summarize the various subjects in respect to which a conflict of views may ordinarily be looked for. Courts, for example, naturally may differ in their conception of what "public policy" requires. They may fail to agree in laying down the extent to which a doctrine of recognized soundness and utility should be carried. So, too, the disposition of the individual judge, in suits involving a political question, is expected to lead him in a direction that favors the party with which he has been identified. We see courts of adjoining States at times diverging widely in their opinion as to the measure of an obligation, in circumstances of fact precisely identical.<sup>2</sup>

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<sup>1</sup> But see the remark of Lord Mansfield in *Millar v. Taylor*, 4 Burrows, 2395, that this was the first instance of a final difference of opinion in the court since he had sat there. He had sat twenty-three years. "Every order, rule, judgment, and opinion *has hitherto* been *unanimous*," said that great judge. "That unanimity never could have happened if we did not among ourselves communicate our sentiments with great freedom; if we did not form our judgments without any prepossession to first thoughts; if we were not always open to conviction, and ready to yield to each other's reasons." In some sense Mansfield, unconsciously enough, was thus paying tribute to his own great power of convincing the minds of other men.

<sup>2</sup> A comparison of two opinions may sometimes afford the reader almost as much amusement as instruction. With the rapid growth in the building of railroads and manufacturing came the need of issuing corporation bonds. The question early arose as to what kind of a purported seal on a bond was sufficient to render it technically an instrument under seal. In Maine a company had printed a fac-simile of their seal in red on the face of the bond. The Supreme Court of that State pronounced it a legal seal: "The instruments under consideration bear upon their face the imprint in red ink of what purports to be a corporate seal. Here there is a substance affixed to the instrument more tenacious than wax or wafer, adopted and declared by the company to be their seal, and we know of no decision in this enlightened age which declares it to be otherwise." *Woodman v. York & Cumberland R. R. Co.*, 50 Me. 543. The case was decided in 1861, the report of it published in 1865. If the reader will turn to *Bates v. Railroad*, 10 Allen, 252, decided in 1865, he will find a decision point blank the other way. In a later case, *Hendee v. Pinkerton*, 14 Allen, 387, Foster, J. says of it: "A fac-simile of the seal of a corporation printed with ink on the blank form of an

A chief justice of marked intellectual ability may leave an impress for years upon the decisions of his court, even to the extent of peculiar views of his own that are shared by scarcely one of his brethren in other jurisdictions. There would seem to be no great difficulty, therefore, in accounting for the cause in a certain proportion of rulings where a difference of opinion displays itself in courts of different States. One community may be agricultural, another commercial, a third largely engaged in manufactures. In one State it happens that capital has accumulated, and the creditor class exercise power in shaping legislation; or they hold, not indeed unfairly, but by the mere fact of their presence, somewhat of the sympathies of the court. In another region most people are borrowers, and judges no less than juries become accustomed to look at a loan of money from the standpoint of the debtor. It does make a difference in the event of a trial whether it be held in a locality where institutions have been long established and conservative habits prevail, or in a new country, where the people are mostly young and active, are impatient of form, and quick to adopt new methods are full of modern ideas of progress. A practising lawyer imbibes freely of the sentiment that prevails among his neighbors. In fact, he has had a full share in its creation. No great wonder is it, then, that, when raised to the bench, the man himself is seen to have undergone little change in his habits of thought and modes of reasoning. The "personal equation," so to speak, in the daily routine of the court, forms an interesting and not unprofitable subject of study.

There are secrets of the consultation room. They should be inviolably kept. All that suitors are entitled to is an announcement of the conclusion that has been reached, unless by the positive terms of the statute judges are required to file written opinions. In those jurisdictions where the statute goes on to prohibit the filing of a dissenting opinion, it is likely for that reason that fewer dissents occur. Were it permitted to enjoy a tolerably full knowledge of the methods by which decisions are arrived at, and

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obligation at the same time when the blank was printed, and by the same agency, has been recently, in full consideration, decided to be a mere scroll, and not a valid seal."

One finds himself in hearty accord with Mr. Justice Grier, who, to the objection that the seal of a Circuit Court authenticating an acknowledgment was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance," remarks, "It is time that such objection to the validity of seals should cease." *Pillow v. Roberts* (1851), 13 Howard, 474.



opinions given their final shape, we should doubtless be put into possession of material of no small value to those of us who are engaged in the trial of causes. Individual dissent forms a subject by itself.<sup>1</sup> But, from its nature, it is not for outsiders to be favored with much more than an occasional glimpse of what is happening after the learned justices retire to consult together.

The foregoing remarks, it must be confessed, have taken a range wider than is warranted by the topic which we had designed briefly to touch upon. We were about to say a word upon confusion of boundaries. It was our purpose to express a regret that divergence of opinion should exist upon a question so apparently simple as that of the occupancy of land between adjoining owners, for a period of time longer than the statutory limit, where it turns out that the division fence has all the while been standing beyond the true line of boundary. The ordinary business man would take it for granted that the law upon such a point as this had been settled long ago with unanimity throughout the United States. He would be surprised at being told that on a state of facts so frequently recurring as this, the courts of two States geographically near and alike in many respects, namely, Maine and Connecticut, are widely at variance.

To make this plain let it be stated in concrete form.

A. and B. have been adjoining neighbors in a town for more than twenty years. During all this time a substantial fence has stood between their lots, not as the result of an agreement that the line of the fence shall be treated as the line of boundary, but simply because each supposed that the fence as originally put there did as a matter of fact stand on the boundary line. A. has occupied a strip of land three feet, we will say, in width, as a part of his own premises. As a matter of fact it had belonged to B., the fence being three feet over on the other's land.

In Maine it must appear that A. had the purpose of holding this land as his own in any event. That is to say, the courts of Maine permit B. to ascertain from A. whether A. did not keep this strip of land through ignorance, inadvertence, or mistake, believing it to be the true line, but with no intention to claim title to that extent,

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<sup>1</sup> A judge dissenting from the doctrine of his own opinion, and saying upon rehearing, "that he now believed that that opinion was wrong," although all the rest of the court adhere to it, is not an every-day spectacle. But see *Marshall v. United States*, 131 U. S. 391.

after it shall have been ascertained that the fence was on his neighbor's land. If A.'s conscience does not permit him to deny the fact that his intent really was to claim the strip only on the condition that the fence was on the true line, the Maine courts declare that his possession is not adverse to B.

This view of what constitutes adverse possession in such circumstances was early combated by the Supreme Court of Connecticut in an admirable opinion by Chief Justice Hosmer.<sup>1</sup> The court in Maine plants itself upon a principle that disseisin cannot be effected by possession taken by mistake.<sup>2</sup> At least this broad statement seems to be justified by an early decision, though the doctrine is now qualified to the extent of stating that possession by mistake may or may not work a disseisin according to circumstances.<sup>3</sup>

Chief Justice Hosmer argues most convincingly that it is "the visible and adverse possession with the intention to possess that constitutes the adverse character, and not the remote views or belief of the possessor."

The doctrine thus disclaimed has recently come up for re-examination in the State of its origin.<sup>4</sup> The opinion by Whitehouse, J., maintains with much force the correctness of the views above indicated of the intention of the adverse holder. It is well worth reading for the ingenuity with which the learned judge meets the objection that the soundness of this position has been questioned in other jurisdictions.

No one denies that the *quo animo* with which land is held is an essential element in adverse possession. It is equally agreed that each party has the intention of occupying and using the land up to the fence as his own. The difficulty arises, it would seem, from attaching a meaning to the term "hostile intention" that may not properly belong to it. The rule of adverse possession takes its origin, we may believe, from the familiar instance of a stranger entering upon the land of another. The intruder, we mean, occupies the land of one to whom he is in reality a stranger. The parties are not neighbors. Occupancy by a stranger, from the very nature of the case, is adverse and hostile in character. It can have but one meaning. The relation, however, of two adjoining owners of land, who live as neighbors to each other, is somewhat different. In most instances propinquity tends to create and keep alive kindly

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<sup>1</sup> French v. Pearce, 8 Conn. 439.

<sup>2</sup> Ross v. Gould, 5 Greenleaf, 204.

<sup>3</sup> Preble v. Railroad Co., 85 Maine, 260.

<sup>4</sup> *Ibid*, Emery, J. not concurring.



feelings. The word "neighborly" springs from this creditable disposition in human nature. One sees, therefore, that A. and B., living for years next each other, being more or less intimate, each depending on the other for society and possibly for aid in time of trouble, are likely to retain friendly relations. Let the occasion arise for discovering that one has been occupying for twenty years a strip of land belonging to the other. This land he has all along supposed was his own, and he always meant to hold it as such. To such a man the word "hostile" has a meaning which he would shrink from attaching to the purpose of which he is conscious in occupying the land in question.

The law looks to the visible outward act. The intention to occupy as his own is undisputed. Occupancy for twenty years brings his case within the general rule, unless, indeed, to use the language of Chief Justice Hosmer, "the invisible motives of the mind are to be explored." An objection to inquiring into hidden motives, and searching the conscience for the moral element involved in the act of possession, lies in the very fact that it assumes to deal with a man's motives. It works unjustly, — is not capable of being applied so as even approximately to deal out a measure of justice to everybody. Besides, it violates the principle upon which the doctrine of adverse possession rests; namely, that possession for a long period presumes the existence of a legal right. This principle harmonizes with what is called "a statute of repose." It is for the interest of the public that lapse of time should create, if not a positive right, at least the privilege of not being disturbed. To sustain a rule founded upon this wise provision there must be some absolute standard of what constitutes an adverse possession. Fencing in land, and occupying it for a long period under a claim that it is his own, would seem reasonably to satisfy the conditions of such a standard.

There is much good sense in what the court in Connecticut, speaking through its chief justice, says: "The person who enters on land believing and claiming it to be his own does thus enter and possess (i. e. adversely). The very nature of the act is an assertion of his own title, and the denial of the title of all others. It matters not that the possessor was mistaken, and had he been better informed would not have entered on the land. This bears on another subject, the moral nature of the action; but it does not point to the inquiry of adverse possession. Of what consequence is it to the person disseised that the disseisor is an honest man?

His property is held by another under a claim of right; and he is subjected to the same privation as if the entry were made with full knowledge of its being unjustifiable."<sup>1</sup>

The Maine court, however, announces an entirely different doctrine as to the effect of a long occupancy of land where the fence has not stood on the true boundary. It says: "In case of occupancy by mistake beyond a line capable of being ascertained, this intention to claim title to the extent of the occupancy must appear to be absolute, and not conditional, otherwise the possession will not be deemed adverse to the true owner. It must be an intention to claim title to all land within a certain boundary on the face of the earth, whether it shall be eventually found to be the correct one or not." Per Whitehouse, J.<sup>2</sup>

The position thus taken and maintained by the learned court of Maine appears to have commended itself elsewhere only in a few jurisdictions, notably in Iowa and in Kansas. We entertain a belief that the time shall come when it will be abandoned, as not consistent with the doctrine of adverse possession as heretofore generally understood and acted upon.

*Frank W. Hackett.*

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<sup>1</sup> 8 Conn. 445.

<sup>2</sup> 85 Maine, 265.



# HARVARD LAW REVIEW.

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THE LAW SCHOOL. — During the past year no instruction was given in the School on procedure under the New York Code. This year a course of lectures on the subject was announced in the Catalogue, to occupy not less than thirty hours. The course is now being given under the charge of Mr. Francis C. Huntington, LL. B. '91, of New York City.

THE LAW SCHOOL LIBRARY. — During the last month gratifying progress was made in securing Reports for the library. The Reports of the following States were purchased: Colorado, Dakota (Territory), North Dakota, South Dakota, Idaho, Kentucky, Mississippi, Missouri, Montana, New Hampshire, Rhode Island, Tennessee, Utah, Vermont, and Washington.

This is in pursuance of the plan, decided upon three years ago, to have two complete collections of Reports in the stack-room; and the rapid increase in the number of students in the School has shown the duplication to be urgently needed. It is hoped that, by the end of the year, nearly all the Reports required will have been secured.

BY WHOM SHALL A STATE CONSTITUTION BE ADOPTED? — The recent constitutional convention in South Carolina pronounced its constitution to be in force, as the fundamental law of the land, without submitting it to a popular vote. The action is rare enough to call for comment. In none of the Northern or Western States, since the adoption of the earliest constitutions, has a constitution been promulgated without a ratification by the people. In all but two of the Southern States, the practice of withholding a constitution from the people has been abandoned, at any rate since 1865. The two exceptions are South Carolina and Mississippi. Even in those States, some constitutions have been submitted to a popular vote, — three out of six in the case of Mississippi, and one out of five in the case of South Carolina.

It would seem perfectly clear that if a legislature directed a convention to submit its work to the people for ratification, the convention would be bound to obedience. The consent of the legislature is necessary in order that a convention may be lawfully held, and this consent may be given conditionally. The terms of the legislative "call," therefore, are binding on the convention. (*Wells v. Bain*, 75 Pa. St. 39.) This view is bitterly attacked *obiter*, in *Sproule v. Fredericks*, 69 Miss. 898; but the position of the court appears to be untenable. When a legislature, on the other hand, expressly dispenses with submission to a popular vote, it would seem equally clear that the convention had the right to declare its constitution in force. In the third and most difficult case, when the legislature is silent as to the submission of the convention's work to the people, the duty and the power of the convention seem to be at variance. No one should question that, in subservience to the best interests of the people, the convention ought to submit its constitution to a popular vote; otherwise, as is pointed out in *Jameson on Constitutional Conventions* (4th ed., §§ 410, 411), the people are at the mercy of a despotic single chamber. Nevertheless, the late South Carolina convention and the Mississippi convention of 1890 (6 HARVARD LAW REVIEW, 56, 57) afford but two examples of a course of action frequently pursued in constitutional conventions prior to 1865. Therefore, where the legislative call is silent as to the necessity of submitting a constitution to confirmation or rejection by a popular vote, it is now too late, in view of historical precedent, to deny the power of a convention to put its constitution in force without submitting it to the people.

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CONTRADICTION OF DYING DECLARATIONS. — A note in the Recent Cases last month (9 HARVARD LAW REVIEW, 432) expressed a doubt as to the soundness of admitting previous statements of the deceased in contradiction of his dying declarations. The New York Law Journal, in its issues of January 31 and February 3, criticises this note as "unconvincing and inconclusive," and argues strongly for the admission of the statements. A word of explanation may not be out of place here. These notes on recent cases are not intended to be either convincing or conclusive; their purpose is to call attention to interesting decisions, and to point out possible objections, if any appear. They are suggestive rather than dogmatic. In the second place, the position taken in the note is worthy of consideration. The argument of the court and of the Journal is directed, in fact, against the weight of dying declarations as evidence, and in this point of view is forcible. But the logical result from this would seem to be to exclude the evidence, or to call the attention of the jury to its weakness. It may be questioned whether, because an unsatisfactory piece of evidence has been admitted, other unsatisfactory evidence should therefore be allowed to impeach it. The objection is not more technical than other matters of evidence, but is based on the general rule excluding hearsay except in special cases. The argument in favor of the evidence based on the loss of cross-examination proves too much, for it would apply to all cases of hearsay. That based on the peculiar nature of dying declarations is stronger, and perhaps should prevail. Evidence against the credibility of the declarant is in general admissible, and as a question of practice the decision may be a wise one. Nevertheless, the considerations here set down seem to make it a doubtful case. *People v. Lawrence*, 21 Cal. 658, mentioned by the



court, is directly in point, and agrees with the principal case, *State v. Lodge*, 33 Atl. Rep. 312 (Del.).

**MARRIED WOMEN — DAMAGES FOR IMPAIRED CAPACITY TO LABOR.** — Though the enfranchisement of woman from her common law bondage has been wellnigh completed by modern statutes, yet the process has gone on so intermittently that the courts are often called upon to fill up the intervals, and, by judicious interpretation of statutes, to systematize and complete the whole work. A recent decision of this sort by the Massachusetts court has not only attracted wide attention among the profession, but has been given public prominence in the columns of the daily press. *Harmon v. Old Colony R. R. Co.*, 42 N. E. Rep. 505, is an authority for the principle that, in an action of tort brought by a married woman for personal injuries, her impaired capacity to labor may be considered in estimating damages. This decision seems a necessary consequence of the statutes which give a married woman the right to her earnings, and allow her to sue for them in her own name; and the result reached is by no means unprecedented, even in Massachusetts. *Jordan v. R. R. Co.*, 138 Mass. 425; *Smith v. R. R. Co.*, 23 S. W. Rep. 784 (Mo.); *Brooks v. Schwerin*, 54 N. Y. 343; *Fleming v. Town of Shenandoah*, 67 Iowa, 505.

All is not perfectly plain sailing, however; for it must be remembered that the husband, notwithstanding modern statutes, still has his action for the loss of his wife's services; and in order that there may not be a double recovery, their respective rights must be carefully distinguished. If the wife has recovered damages in one action for the loss to her attendant upon her impaired capacity to labor, the husband must not be allowed to recover in a later action for a loss which was not his, and for which satisfaction has already been given. However difficult it may be to divide the loss accurately, there can be little doubt on principle as to where the line should be drawn. So far as the injury to the wife disables her from performing household duties, the loss is the husband's and he alone can recover; so far as she is disabled from earning money in an outside employment, the damage is hers. This distinction has been clearly pointed out in many cases. See *Brooks v. Schwerin*, *supra*.

It would seem to follow that if the wife is engaged in no outside occupation, but confines herself to household duties, she should recover no damages of this nature. And it is so held. "The test of her right to damages for loss of time is whether she was in the employment of persons other than her husband, on her own account." *Fleming v. Town of Shenandoah*, *supra*. See also *R. R. Co. v. McGinnis*, 46 Kan. 199; *Filer v. R. R. Co.*, 49 N. Y. 47; *Thomas v. Town of Brooklyn*, 58 Iowa, 438. Yet even in cases where she is not at the time engaged in a separate employment it may be open to question whether the impairment of her earning power, in the abstract, should not be considered by the jury. Conversely, it has been held that, if the husband would recover for the loss of his wife's services, he must show that such a relation existed between them that he was entitled to those services. *R. R. Co. v. Dickey*, 41 Pac. Rep. 1070 (Kan.). The border line between household duties and outside labor is reached when the wife is employed in her husband's business establishment. In such cases, when she receives no wages, the services are assimilated to those rendered in the house-



hold and the husband is allowed to recover damages for their loss. *Street Ry. Co. v. Twiname*, 121 Ind. 375. When she receives regular wages from her husband, even though she could not enforce payment of them, they are hers when they are paid, the presumption is that they would have continued, and consequently, as hers is the loss, it would seem that she should be allowed to recover damages therefor. But the contrary has been held. *Blaechinska v. Howard Mission, &c.*, 130 N. Y. 497.

After all, the general rule of law seems clear, and the only questions are practical ones for the jury. What damage has the wife suffered from the impairment of her capacity to carry on a separate employment? What damage has the husband suffered from the loss of her services in the household? It may be difficult at times to answer these questions satisfactorily. It is no easy matter to determine in every case just what constitutes a separate employment. (See the dissenting opinion of Lott, Ch. C., in *Brooks v. Schwerin*, *supra*.) And the position of the judge whose duty it is to instruct the jury in such a manner that they will carefully discriminate between the two elements of damage may well be no sinecure. But these are the every-day inconveniences necessarily incident to the law as a working system.

CAN A MURDERER ACQUIRE A TITLE BY HIS CRIME?—In *Riggs v. Palmer*, 115 N. Y. 506 (1889), the New York Court of Appeals passed upon the validity of a devise to a defendant who had murdered his testator to prevent a revocation of the will. The action was brought to have the devise cancelled and annulled. The court decreed "that the devise and bequest in the will to Elmer [Palmer, the defendant] be declared ineffective to pass the title to him; that by reason of the crime of murder committed upon the grandfather he is deprived of any interest in the estate left by him." In 4 HARVARD LAW REVIEW, 394, and 8 HARVARD LAW REVIEW, 170, it was suggested that a more satisfactory way of reaching the desirable result of this decision was to allow the devisee to take the legal title under the will, but to compel him to hold the property as constructive trustee for the heirs at law of the testator; thus avoiding the violence done to the plain letter of the Statute of Wills by reading into it a revocation clause.

In *Ellerson v. Westcott*, 42 N. E. Rep. 540 (N. Y.), an heir at law of the testator sued directly for a partition of lands devised to the defendant, who was alleged to have murdered her deviser. The court refused to entertain this form of action, and said that the plaintiff's only remedy was in equity to deprive the devisee of the benefit of her crime. While not expressly overruling *Riggs v. Palmer*, the court sharply distinguishes it from the present case in point of procedure. The following sentences are quoted from the opinion at page 542: "The devise took effect on the death of the testator, and transferred the legal title and right given her by the will. The relief which may be obtained against her is equitable and injunctive. The court in a proper action will, by forbidding the enforcement of a legal right, prevent her from enjoying the fruits of her iniquity. It will not and cannot set aside the will. That is valid, but it will act upon facts arising subsequent to its execution, and deprive her of the use of the property." From this, the New York court seems to have abandoned a position difficult to defend

in theory, and to have adopted substantially the view that a devisee by his own crime may acquire the legal, but not the beneficial, interest in the property devised.

In *Deem v. Millikin*, 6 Ohio Cir. Ct. R. 357, a mortgagee for value without notice from a son who had murdered his mother was properly allowed to retain realty that came to the murderer by descent from his mother. This of course is in accordance with the rule that a *bona fide* purchaser may acquire trust property free from the trust.

It is to be regretted that Pennsylvania has gone to the other extreme and holds (following *Shellenberger v. Ransom*, 59 N. W. Rep. 935 (Neb.), noted in 8 HARVARD LAW REVIEW, 170) that a son who murders his father may take both legal and beneficial interest by the local statute of descent. In *re Carpenter's Estate*, 32 Atl. Rep. 637 (criticised in 30 Am. Law Rev. 130).

#### LIABILITY OF MUNICIPAL CORPORATION FOR DEFECTIVE WATER-WORKS.

— In *Springfield Fire & Marine Insurance Co. v. Village of Keeseville*, 42 N. E. Rep. 405, the New York Court of Appeals recently held that a municipality which maintained a public system of water-works, under a power conferred by the State, was not liable for the loss of property by fire caused by the defective condition of the water-works. The case raises the old question of the liability of a municipal corporation to private action for failure in the performance of a duty, and in the opinion of the court the general grounds upon which this question has always been decided are well set forth. The powers conferred upon municipal corporations by the State are of two sorts, which may be briefly characterized as public and private. The former are the legislative and governmental powers intrusted to the municipality as one of the political divisions of the State. The latter are those conferred for the private benefit of the municipality, which are exercised by it in its private capacity, and with which the State itself is unconcerned. Whether or not, apart from statute, a city is liable to private action for failure in the performance of a public duty specifically enjoined, is a disputed question, though probably it would generally be answered in the affirmative. It is perfectly well settled, however, that for neglect in the exercise of public, discretionary powers, a municipality is no more liable in tort than the State itself would be, while for neglect in the exercise of any private power, it incurs the same liability as a private corporation. *Maxmilian v. Mayor, &c. of New York*, 62 N. Y. 160; *Eastman v. Meredith*, 36 N. H. 284; Dillon on Municipal Corporations, §§ 965 a, 980; Goodnow on Municipal Home Rule, ch. vii.

The difficulty arises in determining to which class any particular power belongs. Is a city which establishes and maintains a system of water-works by permission of the State exercising a governmental function, or is it merely performing the work of a private corporation? The argument from analogy leads to but one conclusion. The cases where the city is liable to an action of tort for failure to perform a duty voluntarily assumed are limited strictly to those where the duty is incurred in the performance of such a purely business undertaking as the management of docks and wharves at a profit. *Mayor, &c. of Lyme Regis v. Henley*, 3 B. & Ad. 77; *Pittsburgh City v. Grier*, 22 Pa. St. 54. Where the duty is undertaken for the public good, the city is not liable. It is accordingly held everywhere that the power to establish a fire department is governmental, and



that consequently the city is not liable for the neglect of firemen to perform their duties adequately. *Fisher v. Boston*, 104 Mass. 87; *Wheeler v. Cincinnati*, 19 Ohio St. 19. And in the similar case of public water-works, which certainly are not maintained as a matter of private corporate interest, but for the general welfare and protection, it has also been held with great unanimity, in accord with the decision under discussion, that neglect to carry on the work adequately will not support a private action. *Tainter v. Worcester*, 123 Mass. 311; *Mendel v. Wheeling*, 28 W. Va. 233; *Black v. Columbia*, 19 S. C. 412.

It is often said that where a city derives a profit from exercising a particular function, it is playing the part of a private corporation and is liable as such. And accordingly it was contended, in *Insurance Co. v. Village of Keeseville*, that the fact of the town's receiving rents from the takers of the water showed that it was a private enterprise. In answering this argument the court points out that "the imposition of water rents is but a mode of taxation, and a part of the general scheme for the purpose of raising revenue with which to carry on the work of government."

It should be borne in mind that the question discussed above is as to the liability of a city for failing to perform, or for performing inadequately, a public duty. A different question arises in considering the liability of the city, not for mere nonfeasance, but for misfeasance in the performance of a duty, causing direct damage to the person or the property of a citizen. *Hill v. Boston*, 122 Mass. 344, 358; Dillon on Municipal Corporations, § 966. Many of the cases which seem at variance with *Insurance Co. v. Village of Keeseville*, and the principles above set forth, are distinguishable on this ground. See, for example, *Scott v. Manchester*, 2 H. & N. 204; *Bailey v. Mayor, &c. of New York*, 3 Hill, 531; *Murphy v. Lowell*, 124 Mass. 564.

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CONVEYANCE OF AN EXPECTANT ESTATE. — The Kentucky Court of Appeals recently declared that the conveyance by a son of his expectant interest in his father's estate is invalid, even in equity. This decision meets with some support, but is contrary to the weight of authority. The court, while following two previously adjudicated Kentucky cases, also supports its decision by an argument of some length. It points to the generally accepted rule that the conveyance or assignment of a bare possibility is at law invalid, and argues that equity should not contradict the law, especially since the equity courts cannot agree upon a common theory for the enforcement of such a conveyance. It further asserts that to hold the conveyance invalid will be to "save multiplying contentions, protect the improvident children and heirs at law from fraud and deceit, — save free and untrammelled the actions of the possessors of estates in their distribution." *McCall's Adm'r v. Hampton*, 32 S. W. Rep. 406 (Ky.).

It is by no means a safe premise that equity should always follow the law; and the argument that, because courts of law will not recognize a conveyance, courts of equity must also decline to recognize it, is unsound. The fact is that most American courts of equity will support such a conveyance, while hardly a court of law will do so. But there is unquestionably much confusion as to the theory on which it is to be supported. Some jurisdictions apply the rules for the conveyance of real property. This leads them into the doctrine of estoppel, with all the confusion that

attends it in this country. Practically all jurisdictions require covenants of warranty, or an equivalent, in order to raise the estoppel, but quarrel on the effect of the estoppel. A Massachusetts decision, *Trull v. Eastman*, 3 Met. 121, holds that the estoppel passes the actual title at law. Other courts hold to the apparently sounder view that the covenant of warranty operates as a personal rebutter preventing the grantor from setting up his estate, or "as if a particular averment had been introduced, and the grantor was estopped by his deed from denying its efficacy." See Rawle on Covenants for Title, 3d edition, p. 412, notes 2 and 3. According to this view the grantee's remedy would be purely in equity. Again, the assignment is supported, regardless of the covenant of warranty and its attendant estoppel, not as a conveyance, but as an executory agreement to convey, a present contract to take effect when the estate comes *in esse*, or as creating an equitable ownership to be changed to an absolute property when the son actually inherits. *Bayler v. Commonwealth*, 40 Pa. St. 37. In these courts the conveyance of an expectant estate, and a contract for the assignment *in futuro* of personalty not *in esse* at the time of the contract, are regarded in the same light. Such a theory has at least the merit of doing full justice to all parties without violating any principles of law or equity.

In nearly all jurisdictions such conveyances are closely scrutinized, owing to the ready opportunities for fraud. That is one reason why a covenant of warranty is held necessary in so many jurisdictions. Everywhere the grantee must have sufficient consideration. The conveyance is looked upon with favor when it is known and approved by the party from whom the estate is to be derived. To invalidate the conveyance in such a case would be to defeat the intent and interest of all parties. In this case which the Kentucky court had to decide everything is favorable. There is a covenant of warranty, with good consideration, absence of fraud, and assent of the father. Under these circumstances, most courts of equity would hold a son's conveyance of his expectant estate to be valid. See 7 HARVARD LAW REVIEW, 429.

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INCORPORATION BY REFERENCE — STATUTE OF FRAUDS. — The note or memorandum required by the Statute of Frauds must contain certain terms. If some of those terms are on one paper and others on another, when may the two papers be read together? This question has been answered by the English courts in various ways; at first they were somewhat strict, but for the last twenty years they have adopted a much looser rule. A recent case, however, *Potter v. Peters* (72 L. T. Rep. 624), looks rather like a return to the older view.

The whole subject is much confused by talking about parol evidence. The question is said to depend on whether parol evidence is admissible to show what the writing referred to, or under what conditions it was written. The difficulty, however, does not lie with any rule of evidence: there is no rule of evidence which forbids one to introduce both writings or to show all the accompanying circumstances. The real question is, What do these facts, when admitted, prove? Do they furnish a note or memorandum containing the requisite terms? One writing contains the defendant's signature and some of the terms, the other writing (assuming it to be unsigned) contains the lacking terms. Are the circumstances such that the second may be considered as part of the first, so as to con-



nect the whole with the defendant's signature? This is a question in the law of incorporation by reference, not in the law of evidence.

The views expressed by the English courts seem to resolve themselves into one of the two following propositions: (1) that the signed document must contain a reference to some other writing, or (2) that it need only refer to a transaction, of which the other writing in fact forms a part.

At the beginning of this century the first of these views was modified by a requirement that the identity of the writing referred to must appear from the reference itself. In *Boydell v. Drummond*, 11 East, 142 (1809), there was a prospectus of sale, and the defendant signed a book headed "Shakespeare Subscribers, their Signatures." During the argument Lord Ellenborough said, "What is there in the title to refer to the particular prospectus rather than any other? If it had referred to the particular prospectus then published, it would have helped the plaintiff over his difficulty." This early modification, however, was dispensed with in *Peirce v. Corf*, 9 Q. B. 210 (1874), where the court adopted without limitation the view expressed in the first of the above propositions: "On the document itself there must be some reference from one to the other, leaving nothing to be supplied by parol evidence except the identity, as it were, of the document." Though couched in terms of evidence, this amounts to saying that when the signed paper contains a reference to some other writing, whether to a particular one or not, and there exists another writing which is shown (no matter how) to be the one referred to, the second writing can be incorporated into the first, and the defendant's signature will thus be annexed to both in a way satisfactory to the statute.

After *Peirce v. Corf* there came a series of cases, in which the courts, though professing to follow the first rule, seem in substance to have adopted the second, namely, that if a signed document refers to a transaction generally, it will incorporate any document connected with that transaction.

In *Long v. Millar*, 4 C. P. Div. 450 (1879), the signed document referred to "the purchase,"—not to any document connected with the purchase, but to the transaction generally. The court there incorporated a paper containing the plaintiff's agreement to buy, and tried to reconcile the case with the former rule by construing "the purchase" to mean "the agreement to purchase." In *Studds v. Watson*, 28 Ch. Div. 305 (1884), the second proposition was squarely stated by North, J., as follows: "There is a parol agreement proved to which both these documents refer. All the terms of this parol agreement are found in one or the other of the two documents, and are in themselves sufficient to constitute a good memorandum within the statute. . . . I do not think it is necessary in this case that these two documents should refer the one to the other." In that case, to be sure, both papers were signed, but the court appears not to have noticed the fact. Again, in *Oliver v. Hunting*, 44 Ch. Div. 205 (1890), there was a letter acknowledging the receipt of a check "on account of the purchase money for the Fletton Manor House estate," and this was held to refer to and incorporate a previous memorandum relating to this transaction. There was here no reference to a document, but merely to the transaction of which the document was a part. Thus at this period the English courts had abandoned the first rule and had virtually adopted the second.

In 1895 the question came up again in *Potter v. Peters*, *supra*.



Here the defendant's agent, who had already written to the defendant informing him of an offer, wrote a second letter to his solicitor, putting him in communication with the buyer's solicitor. The Court refused to connect the two letters. This seems to point to the older rule that the signed document must refer to some other writing, not simply to the transaction generally.

It may be doubted whether the English courts have been justified in stretching the doctrine of incorporation by reference to the extent to which the cases of *Studds v. Watson* and *Oliver v. Hunting* appear to go. While one may well enough be held to have adopted and signed a paper to which he has in a signed writing referred, it is at least going far to say that the signature can be carried over and attached to a writing which is not connected with the first in any other way than that it is a part of the same transaction.

The foregoing considerations are submitted as applying to a case where an unsigned document is sought to be incorporated into one that is signed. When both are signed, there should be no necessity for connecting the two; for the defendant has subscribed his name to all the requisite terms, and this would seem to be all that the statute requires. This view has been taken in *Thayer v. Luce* (22 Ohio St. 62), and on this ground *Potter v. Peters* might well have been decided differently.

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MAY THE VENDOR OF THE GOODWILL OF A BUSINESS SOLICIT HIS OLD CUSTOMERS?—What passes by the sale of a goodwill of a business? What obligations are imposed on the vendor by reason of the sale? These troublesome questions have again been raised in the case of *Trego v. Hunt*, 12 *The Times* L. R. 80, decided last December in the House of Lords. The decree in the case restrained the vendor of the goodwill from soliciting the trade of his old customers in person, by agents, or by letter. The case of *Labouchere v. Dawson* (L. R. 13 Eq. 322), decided in 1874 by Lord Romilly, M. R., and overruled twelve years later in the Court of Appeals by *Pearson v. Pearson* (27 Ch. Div. 145), is re-established, and *Pearson v. Pearson* is in turn overruled. The reasoning is this. A vendor of the goodwill sells the benefit of the connection of his concern, that is, the chance that the customers will continue their patronage. It is obvious that by solicitation of the old customers, the vendor, on setting up a similar business, may greatly lessen the purchaser's chance of retaining that patronage. But a man may not depreciate what he has sold: therefore the vendee of the goodwill is entitled to protection, and his vendor will be restrained accordingly from soliciting the old customers. "It is immaterial," says Lord Herschell, "whether the obligation on the part of the vendor to refrain from canvassing the customers is to be regarded as based on the principle that he is not entitled to depreciate that which he has sold, or as arising from an implied contract to abstain from any act intended to deprive the purchaser of that which has been sold." Of course, a logical application of either principle would carry the courts far beyond restraining a mere solicitation of old customers. This fact is recognized; but it is acknowledged that it is now too late to question the authorities which establish the vendor's right to set up a similar business (*Shackle v. Baker*, 14 Ves. 468), to advertise his business and solicit customers in any public way (*Labouchere v. Dawson*, L. R. 13 Eq. 322), so long as he does not use the firm name, or represent that he is continuing

the old business (*Churton v. Douglas*, Johns. 174, at 191), or to deal with his old customers (*Leggott v. Barrett*, 15 Ch. Div. 306). That the vendee's right cannot be protected to the full, is no reason in the eyes of the court for not extending protection as far as these authorities will allow.

The American decisions on this point are few, but emphatically opposed to the conclusion reached in *Trego v. Hunt*. The courts take the ground that it is the vendor, not the purchaser, who should have protection. The vendor has sold the advantage of an established business. It is only fair that he should be given every opportunity to compete on an equal footing with the purchaser. Goodwill, to be sure, is the probability of retaining the concern's customers; but it is a probability which the vendor may diminish by the exercise of certain unquestioned rights. What consistency is there in allowing the vendor to enter into the same kind of business, and to solicit trade publicly, and yet barring him from his most effective means of competing successfully, namely, the solicitation of his old customers? This is the attitude of the American courts. (*Williams v. Farrand*, 68 Mich. 473; *Cottrell v. Babcock & Co. Mfg. Co.*, 54 Conn. 122; *Close v. Fleisher*, 28 N. Y. Supp. 736.)

After all, is it not a question of original definition? Are not the courts, under the guise of deducing conclusions from accepted definitions, in reality defining anew the nature of goodwill? As goodwill is conceived of, on the one hand, as the chance of keeping the old customers subject to unlimited competition on the part of the vendor, or, on the other, as that chance free from such competition, so will the vendor be allowed or denied the right to solicit his old customers. And perhaps the English view of the scope of goodwill is the more just. Eighty years ago, Vice-Chancellor Plumer said: "A person, not a lawyer, would not imagine when the goodwill and trade of a retail shop was sold, the vendor might, the next day set up a shop within a few doors and draw off all the customers. The goodwill of such a shop in good faith and understanding must mean all the benefit of the trade, and not merely a benefit of which the vendor might deprive him the next day." (*Harrison v. Gardner*, 2 Mad. 198, at 219.) Yet mainly because of a strong aversion to the enforcement of any contract in restraint of trade that was not to be found in express words, the courts declined to adopt the lay conception of goodwill so vigorously approved by the Vice-Chancellor. Is not the decision in *Trego v. Hunt* commendable in that, as far as it is possible, it does adopt the view, then and now prevalent outside the courts, as to what constitutes fair business dealing? It certainly clothes that shadowy, intangible property, goodwill, stripped of wellnigh all its virtue by unfriendly decisions, with a little substance.

There is one seeming inconsistency in the law on this point as laid down to-day in the English courts. Solicitation of customers when the business is voluntarily sold is restrained; solicitation after the business is compulsorily sold in bankruptcy proceedings is not restrained. (*Walker v. Mottram*, 19 Ch. Div. 355.) On what principle can goodwill mean one thing when a man disposes of his business voluntarily, and another when his business is sold out by his assignees in bankruptcy?

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MONEY PAID ON A BILL BEARING A FORGED INDORSEMENT. — Does the drawee who pays a bill with a forged indorsement upon it have to bear the loss? Is the familiar doctrine of *Price v. Neal* properly extended to



such cases? Is there no fundamental distinction between a forged indorsement and a forged drawing as affecting the rights between the drawee and the innocent indorsee to whom he has paid the bill? In *The London & River Plate Bank v. The Bank of Liverpool*, [1896] 1 Q. B. 7, Mathew, J. rests the two cases on the same grounds, and decides that the drawee who pays the innocent indorsee of a bill bearing a forged indorsement cannot recover back the money, on the principle that the payment by the drawee has caused the indorsee to lose his rights against prior indorsers. Undoubtedly the defendant can no longer charge prior parties as indorsers, as the time for notice of dishonor has gone by, but his rights on the warranty, implied in the sale of any chattel, remain unimpaired (2 Ames, Cases on Bills and Notes, 242, n. 1), and it is doubtful if it is of itself any defence to one who has received money under a mistake of fact, there having been a total failure of consideration, that his rights against other parties have been changed or his relations in respect to them altered. *Bobbett v. Pinkett*, L. R. 1 Ex. Div. 368; *Canal Bank v. Bank of Albany*, 1 Hill, 291; *Rheel v. Hicks*, 25 N. Y. 289; *Koonst v. Central National Bank*, 51 Mo. 275. It is said further, that "no single case has been produced in which, where payment has been made on a forged indorsement to the holder of it in good faith, the money has been recovered back." It is rather unfortunate that in so important a case the attention of the court was not called to *Bobbett v. Pinkett*, *supra*, a decision which is very difficult to reconcile with the principal case. The American cases in which such recovery has been allowed are collected in 1 Ames, Cases on Bills and Notes, 433, n. 2.

In *Price v. Neal*, 3 Burr. 1354, it will be remembered that it was the drawer's name that was forged, and it was held that the drawee, having paid an innocent indorsee, must himself bear the loss. But the distinction between such a case and one where an indorsement is forged is obviously that in the latter case the indorsee has never obtained legal title to the instrument, and, however innocent he may be, he is immediately liable at law to the true owner for the conversion. This principle is expressly recognized in *Bobbett v. Pinkett*, *supra*. If, as in the principal case, the drawee has paid the true owner, it would seem that the drawee should be subrogated to his rights and be enabled to compel the indorsee to account for the money received to his use. The whole subject is elaborately discussed in 4 HARVARD LAW REVIEW, 297.

It is to be hoped that the solution of a question of so much importance will not be left to depend on the authority of a single justice of the divisional court, but that the case will be carried up to the higher courts.

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THE "TRUST FUND" THEORY. — In the late case of *Adams & Westlake v. Deyette* (65 N. W. Rep. 471), the Supreme Court of South Dakota rests its decision on the ground "that the assets of a corporation are a trust fund for its creditors." On this theory a judgment confessed by a corporation for money due on an executed *ultra vires* contract, admitted to give a right of action for the sum recovered, was set aside as a preference of creditors. The "trust fund" doctrine seems to owe its origin to a decision by Judge Story in 1824, in the case of *Wood v. Dummer* (3 Mas. 308). Since that decision it has been alternately applied and rejected by courts and eulogized and condemned by text writers. Within the last two years Judge Thompson has characterized it as "the only doctrine worthy

of respect," and the Supreme Courts of Indiana, North Carolina, and Alabama have distinctly repudiated it, the latter overruling a number of cases where its existence had been recognized. See 5 Thompson on Corporations, 5115; *Bank of Crawfordsville v. Dovetail &c. Co.*, 40 N. E. Rep. 810 (Ind.); *Thomson-Houston Co. v. Henderson Co.*, 21 S. E. Rep. 951 (N. C.); *Jewelry Co. v. Volfer*, 17 So. Rep. 525 (Ala.).

Just what the doctrine is, even those who uphold it do not seem to know. It seems to be an accommodating judicial *ignis fatuus*, which is present or absent as courts seem to require. No court has been able to describe it exactly or to define its limits. It is admitted that there is no trust in the strict sense of the term. But these admissions tend to still greater confusion. The logical conclusion of holding that there was a strict trust would be that the creditor of an insolvent corporation could not enforce his claim at law. When this argument was pressed on the court in *Gottlieb v. Miller* (154 Ill. 44), they qualified their previous statement by holding that there was a "quasi trust" only. The United States Supreme Court has long been committed to the "trust fund" doctrine, yet in the recent case of *Hollins v. Brierfield &c. Co.* (150 U. S. 371) Justice Brewer practically admits that the expression is figurative; and Justice Bradley, in *Graham v. R. R. Co.* (102 U. S. 148), while upholding the doctrine, is forced to acknowledge that "if pushed to its logical conclusion, it would lead to results not to be tolerated," and yet he does not seem able to define the limits within which it will be tolerated.

This general haziness that surrounds the whole doctrine leaves the student in a confused state of uncertainty as to what the doctrine really is. Mr. Pepper, however, in a recent able article (2 Am. Law. Reg. & Rev., N. S. 448), clears up much of this uncertainty. He deprecates the use of the expression "trust fund" as a misleading misnomer, and suggests that the courts have used it as a cover for judicial legislation. The cases seem to justify this view, and it must be admitted that justice often demands legislation by the courts in dealing with insolvent corporations.

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## RECENT CASES.

**ADMIRALTY — RECOVERY FOR DEATH BY WRONGFUL ACT.** — Where a State statute gives the personal representative of one killed by the negligent handling of a vessel a right of action, and makes any damages that may be recovered a lien upon such vessel, *held*, a suit may be maintained in the Federal courts to enforce such right of action. *The Willamette*, 70 Fed. Rep. 874.

It has been frequently argued that there can be no recovery in suits of this kind, on the ground that there is no action given by general maritime law, and it is not competent for a State to alter this. But statutes giving a recovery exist in some thirty States, and their validity has been upheld in *Sherlock v. Alling*, 93 U. S. 99. An elaborate review of the authorities is found in *The City of Norwalk*, 55 Fed. Rep. 98.

**BILLS AND NOTES — FICTITIOUS PAYEE.** — A clerk of the plaintiffs represented to them that they were indebted to B., and they drew a check to the order of B. in payment. There was no such person as B., and the clerk indorsed the check to the defendant, a *bona fide* purchaser, who received payment from the bank. In an action for the money, it was *held*, that the check was payable to bearer, and there could be no recovery against the defendant, a holder in due course. *Clutton v. Attenborough*, [1895] 2 Q. B. 707.

This affirms the judgment of Wills, J., [1895] 2 Q. B. 306. The Bills of Exchange Act, 1882, provides that where the payee is fictitious the bill may be treated as payable



to bearer, and perhaps as a question of construction the decision above is correct. The case of *Bank of England v. Vagliano Bros.*, [1891] App. Cas. 107, on which the court rely chiefly, should be distinguished, however. It is the intention of the drawer, and not that of the acceptor, which governs, and hence, apart from the statute, the Vagliano case would seem to be right and the principal case wrong. The correct result was reached in *Shipman v. Bank*, 126 N. Y. 318, and in *Armstrong v. Bank*, 46 Oh. St. 512. See *Kohn v. Watkins*, 26 Kan. 691, *contra*; and so in the case of the making of a note; *Ort v. Fowler*, 31 Kan. 478, and *Bank v. Rowan*, 14 N. S. W. L. R. 127.

**BILLS AND NOTES — FORGED INDORSEMENT.** — The innocent indorsee of a bill bearing a forged indorsement received the amount of the bill at maturity from the drawee, who, having paid the bill again to the true owner, seeks to recover back the money paid to the *bona fide* holder. *Held*, the drawee cannot recover. *The London & River Plate Bank v. The Bank of Liverpool*, [1896] 1 Q. B. 7. See NOTES.

**BILLS AND NOTES — VENDOR'S LIEN — PAYMENT BY INDORSER.** — *Held*, where A. held two notes of the same date secured by a vendor's lien, and the one first due was dishonored and taken up by an endorser, and then transferred without A.'s knowledge, the lien on this note was postponed to that on the one still held by A. *Goddard v. Peeples*, 33 S. W. Rep. 314 (Tex.).

The two liens should have been held co-ordinate. If the *maker* of the note had paid it and then sent it out again, the decision of the court would of course be sound. *Union Trust Co. v. R. R. Co.*, 63 N. Y. 311.

**CARRIERS — LIABILITY ON BILL OF LADING.** — The defendant company, on receipt of certain grain, issued a bill of lading in one part, and also two duplicates of this original. On the original there was no mention of any other bill, nor any clause "this being accomplished the others to stand void." The plaintiffs were pledgees of the original bill of lading. The defendants delivered the grain to the original shipper on his presenting one of the duplicate bills. The plaintiffs then brought this action against the defendant company. *Held*, that the railway company was liable on its bill of lading. *Midland Nat. Bank v. Missouri Pacific Ry. Co.*, 33 S. W. Rep. 521 (Mo.).

This is an admirable decision. A carrier issuing bills of lading in this form binds himself to deliver to its holder, and any other delivery is made at the risk of being unable to fulfil his contract and becoming liable therefor. Bills of lading in this form do not seem to have been the subject of litigation before this case. In *Forbes v. Boston & Lowell Ry. Co.*, 133 Mass. 154, the carrier was held liable to the holder of a bill of lading for the mis-delivery of certain corn. On the other hand, local custom was held sufficient excuse for giving up certain wheat without presentation of the bill. This is not so clear. In the principal case the court rightly held the duplicates to be mere memoranda, and of no more effect than memoranda.

**CONSTITUTIONAL LAW — EMINENT DOMAIN — PUBLIC SERVITUDE.** — A citizen of Mississippi sought to enjoin the construction of a levee across his plantation, situated upon a navigable river in Louisiana. Defendants justified under a legislative act. *Held*, by the substantive law of Louisiana, plaintiff's land, and all similarly situated, is held subject to a right in the State to take any part needed for levees, without compensation. *Eldridge v. Trezevant*, 16 Sup. Ct. 345.

The Supreme Court of Louisiana has frequently followed this rule, although the Constitution of that State (Art. 156) forbids a public taking of private property without compensation. The Supreme Court of the United States thought that plaintiff could not invoke the Fourteenth Amendment, which is satisfied if the State law is impartially administered, — here admittedly the fact. Previous cases have arisen under grants by France and Spain; the present case concerned land granted by the United States, but the rule was applied, the court thinking the matter settled by the decisions that the extent of riparian titles to land upon navigable non-tidal rivers, though granted by the United States, depended upon the law of the State in which such land is situated. It thought that the same cases decided that land granted by the United States is subject to local regulations applicable to land held under State grant; also that the Fourteenth Amendment does not apply to servitudes, held by the State courts to be valid. It is doubtful whether any of the cases cited go, in terms, to the extent of the part of the proposition last stated, though the decision seems correct. For a full discussion of the general subject, see *Shively v. Bowlby*, 152 U. S. 1. *Peart v. Meeker*, 45 La. Ann. 421, is a recent case under the Louisiana rule.

**CONSTITUTIONAL LAW — LICENSES — PEDDLERS.** — A statute providing that city and town authorities "may issue a license to such persons as they find proper persons to engage in a temporary or transient business . . . for the sale of goods, wares, and merchandise," for certain fees, and making it a misdemeanor to engage in such business

without a license, was held unconstitutional, since it gives officers power to exercise an arbitrary discretion in granting licenses. *State v. Conlon*, 33 Atl. Rep. 519 (Conn.).

A very forcible argument might be made that the context indicates that the words "may issue a license" should be construed "shall issue a license"; and that the words "such persons as he finds proper" vest in the officer not an arbitrary discretion, but a discretion which he is bound to exercise honestly and reasonably, for the purpose of effectuating the intention of the statute. *State v. Yopp*, 97 N. C. 477; *Singer v. Maryland*, 72 Md. 464; *Comm. v. Parks*, 155 Mass. 531. The act would thus be preserved, and the rights of those against whom it was directed would be sufficiently protected, since, if the officer abused his power by exercising an arbitrary discretion, his act would be unconstitutional and invalid. *Yick Wo v. Hopkins*, 118 U. S. 356. However, words less strong than those in the principal case have been held to confer an arbitrary discretion. *Mayor of Baltimore v. Radecke*, 49 Md. 217; *State v. Dering*, 84 Wis. 585. It is to be noticed that those are cases of city ordinances, and might be supported on the ground that the legislature does not give a city the right to make unreasonable ordinances, and the ordinances in question afford such an opportunity for unreasonable action on the part of the officers as to make them unreasonable ordinances.

CONSTITUTIONAL LAW — SEIZURE OF PRIVATE PROPERTY AS CRIMINAL EVIDENCE. — A steam boiler exploded on plaintiff's premises, killing thirty-seven persons. The engineer was indicted for criminal negligence, and ten days after the accident the court ordered the boiler and engine into the custody of the police, not to be removed from the premises, to be used as evidence against the engineer in the pending trial. Plaintiff applied for a writ of mandamus to vacate this order, as an unwarrantable interference with his rights of property. Held, such an order directed against private property of this character belonging to an innocent party was an unreasonable seizure of goods, and unconstitutional. *McGrath, C. J.*, dissenting on the point of unreasonableness. *Neuberry v. Carpenter*, 65 N. W. Rep. 530 (Mich.).

No reported case seems to have gone to the length of sustaining a seizure like the present. Most of the instances where personal property belonging to a third party has been held as evidence by public officers have been cases of stolen property, tools, and coin used in counterfeiting, gaming apparatus, etc. In the principal case it was perfectly possible to preserve evidence of the condition of the boiler without depriving the owner of its use, and the attempted seizure seems plainly unreasonable.

CONTRACTS — PUBLIC POLICY — DEFENCE. — Held, that where a contract is not in general restraint of trade according to the rule in *The Diamond Match Co. Case*, 106 N. Y. 473, a defendant who retains the consideration for his promise cannot set up as a defence that his contract is part of a conspiracy to raise prices and lower wages. *National Wall Paper Co. v. Hobbs*, 35 N. Y. Supp. 932.

It would seem that where a contract is shown to be part of a general scheme to lessen competition, the court should not aid either party in enforcing it. Illegality should be a perfect defence to an action on a contract. *Emery v. Ohio Candle Co.*, 47 Ohio St. 320; 68 N. Y. 558, 566.

CONTRACTS — SALVAGE — FRAUDULENT CONCEALMENT — COMPENSATION. — A salvage contract was entered into between the master of a tug and the master of a disabled steamer, the former suppressing the fact that the owners of the steamer had already employed another tug to tow the steamer to her destination. Held: (1) the contract must be set aside on account of fraud; (2) the master of the tug is entitled to recover the amount by which the steamer was found to have been actually benefited by comparing the expense actually incurred with that which would have attended a towage by the tug engaged by the owners. *Goff*, Circuit Judge, dissenting on second point. *The Clandeboye*, 70 Fed. Rep. 631.

The rule invoked, that if the sources of knowledge of material facts are exclusively within the possession of one of the contracting parties there is a duty to disclose (2 Kent, \*482), would seem to be included within Bigelow's broader proposition, that "a duty to speak . . . arises wherever and only where silence can be considered as having an active property, that of misleading." <sup>1</sup> Bigelow on Fraud, 597. As to the right to recover compensation, there is a strong analogy to cases where a conveyance of land has been obtained by the fraud of the buyer; there the seller may have a reconveyance, but is obliged to pay back the consideration money and sums laid out in improvements. *Kerr*, Fraud and Mistake, 2d ed., 373. One rescinding on account of fraud must put the other party in the same position, as far as possible, as he was in the beginning.

CORPORATIONS — FEDERAL JURISDICTION — COLLUSIVE CONVEYANCE. — X., a Virginia corporation, claimed to own land in Virginia which was in possession of defendant. For the purpose of trying the claim in the Federal Court, the stockholders of X.



organized plaintiff corporation under the laws of Pennsylvania. X. then conveyed to plaintiff without consideration, and plaintiff brings suit in the Federal Court. *Held*, that such conveyance would not enable the grantee to maintain suit. Shiras, Field, and Brown, JJ., dissenting. *Lehigh Co. v. Kelly*, 16 Sup. Ct. Rep. 307.

The rule is well established that notice in this class of cases will not affect the right of the grantee to Federal jurisdiction if the conveyance was a real transaction and there was no secret agreement giving grantor a right to call for reconveyance. *McDonald v. Smalley*, 1 Pet. 625; *Barney v. Baltimore City*, 6 Wall. 280. The court admits that there was no such secret agreement between the two corporations, but in view of the fact that no consideration was paid, it goes behind the entity of the plaintiff corporation and finds what it calls an "equivalent to such agreement," namely, the right and power of those who are stockholders in each corporation to compel the plaintiff to reconvey to X. without consideration. If there had been a consideration for the conveyance, the question of whether the court would look behind the entity would have been very squarely presented. This is a question that is constantly arising in different phases. Compare *Northwestern Banking Co. v. Muggli*, 65 N. W. Rep. 442 (S. D.), and *Howes v. Oakland*, 104 U. S. 450.

**CORPORATIONS — UNPAID SUBSCRIPTIONS — ILLEGALITY SUBSEQUENT TO INCORPORATION.**—In an action by a corporation to recover unpaid subscriptions to its capital stock, the defence was set up that the corporation had entered into illegal transactions subsequently to its incorporation. *Held*, that this is no defence, the objects of incorporation being on their face legal. *U. S. Vinegar Co. v. Foehrenbach*, 42 N. E. Rep. 403 (N. Y.).

The case simply follows *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537, which laid down the doctrine that subsequent acts of illegality, though they might be good ground for vacating the charter in a direct action by the State, were no defence to an action by the corporation to recover unpaid stock subscriptions.

**DAMAGES — CONVERSION OF STOCK BY ONE AUTHORIZED TO TRANSFER IT AS COLLATERAL.**—Stock in a certain company was issued to the defendant in his own name for the benefit of the plaintiff, from whom he had authority to transfer it as collateral security for a loan of \$5,000 for the plaintiff. Having transferred the stock to W. to secure the loan, turning the proceeds over to the plaintiff as per agreement, he subsequently sold it to W. absolutely, without accounting to the plaintiff, who seeks to recover for the alleged conversion. *Held*, plaintiff was not entitled to recover the full value of the stock, but must deduct the amount received as the loan. *Van Shaick v. Ramsey*, 35 N. Y. Supp. 1006.

The result reached seems correct. The difficulty is to find a conversion on the part of the defendant when he has already transferred the legal title with the authority of the beneficial owner; moreover, the plaintiff never had legal title to the stock himself. The first objection is perhaps obviated by the fact that, though the court speaks of the first transfer by the defendant as a mortgage, it is more properly regarded as a pledge, the legal title remaining in the pledgor. Lowell on Transfer of Stock, § 53: *Lewis v. Graham*, 4 Abb. Pr. 106. A simpler way of treating the case would seem to be as a breach of trust on the part of the defendant in releasing the equity of redemption which he held in trust for the plaintiff, in which view of the case the amount of damages would follow as a matter of course.

**DAMAGES — ELECTRIC RAILWAY — USE OF CABLE TRACK — COMPENSATION.**—An electric railway was granted by the city of St. Louis the right of using the tracks of a cable railway. The cable company was allowed a sum equal to six per cent per annum on half the cost of building. *Held*, the cost of building the cable conduit should be included, though the conduit cannot be used by the electric company, and its construction made the cost of the cable road much greater than that of an electric road. *Grand Avenue Railway Co. v. People's Railway Co.*, 33 S. W. Rep. 472 (Mo.).

It is fairly well settled that a city, in the absence of express legislative enactment, has no power to grant exclusive street railway rights to a single corporation. *New Orleans v. Crescent R. R. Co.*, 12 Fed. Rep. 308. It would seem logically to follow that, when a city gives a railway company the right to use the tracks of another company, it exercises a reserved right rather than the right of eminent domain. This view has been adopted in Missouri. *Union Depot R. R. Co. v. Southern R. R. Co.*, 100 Mo. 562. The question presented in the principal case therefore is not one of damages for condemnation of property under eminent domain, but a question simply of what is "just compensation" for the use of the tracks by the electric road. The exact question here presented does not seem to have arisen before, but the decision, it is submitted, is sound. Of course, there is a strong argument that, as the electric road does not use the conduit, it ought not to be made to pay for the use. The answer is that, though

it may not actually use the conduit, yet for the time being it prevents the cable company from using it. The sound doctrine would seem to be that the electric company takes the road as it finds it, and must pay in proportion to the total original cost, whether they use the conduit or not — whether they use one rail or both rails.

**EQUITY — DEGREE OF SPECIFICATION FOR DISCOVERY.** — In an action for selling coal as plaintiffs' which in fact was not theirs, there were allegations that defendants had "on divers occasions taken orders from A. and divers other persons" in the supply of which they had given coal as from plaintiff's mines which was not from there, and of a quality inferior to that. Sale to A. was admitted by defendants, but objection was made to discovery and production of books till further specification of the alleged torts. *Held*, there is no definite rule governing the degree of concreteness in such allegations. This is not a case where plaintiffs are seeking to establish a possible claim from defendants' books. Discovery to precede the order to give particulars. *Waynes Merthyr Company v. Radford & Co.*, [1896] 1 Ch. 29.

No one can quarrel with such a case. The allegations were the only ones possible to most plaintiffs in the same circumstances, and the books of defendants would be highly relevant to their substantiation. The rule against fishing is necessarily one of convenience to prevent the institutions of vexatious and baseless suits. Here there had been one distinct allegation which defendants had admitted in proceedings relative to the interim injunction. It is hard to see how a judge could have in reason demanded a full specification of the wrongful alleged sales without inspection of defendants' books, though plaintiffs might well be assured that there had been such sales by collateral circumstances such as they alleged in the depreciation in the price of their own coal.

**EQUITY — JUDGMENT — BILL IN EQUITY TO VACATE.** — Final judgment having been rendered in a suit, the defendant brought a bill in equity to have the judgment vacated on the ground of fraud, the fraud alleged being the false statement by the attorney of the plaintiff, out of court, that certain allegations in his complaint were true. *Held*, no ground for vacating the judgment. *Town of Andes v. Millard*, 70 Fed. Rep. 515.

The recent case of *Zellerbach v. Allenberg*, 67 Cal. 296, lays down the rule that to vacate a judgment on the ground of fraud, it must appear that the fraud was practised in the very act of obtaining judgment; for any fraud anterior to that is a defence available at law, and therefore concluded by the judgment. It is difficult to formulate a general rule in this class of cases, and the above is perhaps too comprehensive. See *In re O'Neill's Estate*, 63 N. W. Rep. 1042 (Wis.); *Noyes v. Loeb*, 24 La. Ann. 48. The decision in the principal case, however, is clearly correct. Nothing appears to take it out of the rule stated above.

**EQUITY — VENDEE'S LIEN — CONSIDERATION WHOLLY PAID.** — M. agreed to convey to T. an undivided half of certain premises. T. gave the full consideration. M. died, having executed a trust deed to secure a loan, without conveying to T., and T. filed this bill against her administrator for an account and a sale of the premises. *Held*, that, as specific performance is an inadequate remedy, plaintiff is entitled to a lien on the whole premises. *Townsend v. Vanderwerker*, 16 Sup. Ct. Rep. 258.

It seems well settled now that a vendee has a lien for purchase money paid when specific performance is inadequate or impossible, on the same broad equitable grounds on which the vendor's lien rests. *Galbreath v. Reeves*, 82 Tex. 257; *Wickman v. Robinson*, 14 Wis. 493; *Wythes v. Lee*, 3 Drew, 396; *Rose v. Watson*, 10 H. L. Cas. 672. In the principal case, strangely enough, though the whole consideration has been given, the equitable lien is better for plaintiff than specific performance. The result seems right. The plaintiff has an equitable title to half the premises. As M. charged the estate with a debt, her share should be taken first to pay that off, and so plaintiff should be allowed a lien on the proceeds of the sale after satisfaction of that debt.

**EVIDENCE — ANCIENT DOCUMENTS — PROOF OF CONTENTS.** — Where an instrument itself would be admissible without proof of execution, being over thirty years old, and its absence is satisfactorily accounted for, *held*, that evidence of its contents was likewise admissible without proof of execution. *Walker v. Peterson*, 33 S. W. Rep. 269 (Tex.).

This is an interesting result from the application of two rules. The loss of the document being explained, secondary evidence of its contents was properly admitted, and, being an ancient document, proof of execution was unnecessary.

**EVIDENCE — HEARSAY.** — To prove the age of a girl who had been abducted, the evidence of a school teacher, to whom the girl had told her age, was offered. It was rejected because the witness had to refer to her school record to show it, and without



the record could not remember it. *Held*, error. The court, following previous decisions, were of opinion that the witness should be allowed to read the record if her memory failed. *People v. Brown*, 35 N. Y. Supp. 1009.

While not quarrelling with the court's decision that witness might read the attested record, there is another obvious and fundamental objection to the admission of this evidence. The teacher was not one in a position to give direct evidence on the point in issue, and whatever she might say would be purely hearsay, and so assuredly inadmissible. A case much like the present in its facts, and correctly decided the other way, is *Brain v. Preece*, 11 M. & W. 773.

EVIDENCE—SABBATH-BREAKING—BURDEN OF PROOF OF THE NECESSITY OF THE ACT.—On an indictment for Sabbath-breaking in working a pump and a fan in a mine on Sunday to keep it free from water and gas, it was *held* that the burden is on the defendant to prove that the work is one of necessity. *Shipley v. State*, 33 S. W. Rep. 107 (Ark.).

The case seems to proceed on the ground that it is a fact peculiarly within the knowledge of the defendant; if this were a general principle, a criminal would usually have to prove his own innocence. The true ground would seem to be that the duty of going forward with evidence is cast upon the defendant in order to rebut the natural inference that this is not a necessary operation.

JURISDICTION OF SUPREME COURT ON APPEAL FROM A STATE COURT.—In an action for damages for ejection of plaintiff from a car, the conductor refusing to receive a worn ten-cent piece in payment of the fare, the jury found a verdict for the plaintiff. Judgment was affirmed by the Supreme Court of New Jersey. Defendant now appeals to the United States Supreme Court, contending that his right to do so is secured by Rev. Sts., § 709, providing that where any title, right, etc. is claimed under the Constitution or laws of the United States, and the State court decides against such title, right, etc., a writ of error lies to the United States Supreme Court. *Held*, contention of defendant that the coin was not legal tender under the laws of the United States is not a claim to any right under such laws, but a denial of such claim; therefore the decision of the State court against the defendant is not against such a right so as to authorize a review by the Supreme Court of the United States. *Jersey City & B. R. Co. v. Morgan*, 16 Sup. Ct. Rep. 276.

It is to be noticed that a coin worn merely by natural abrasion is legal tender. The jury found the ten-cent piece to have been so worn. Defendant, though he denied that the coin was legal tender, did not set up any right under a United States law in reference to the reduction in weight of silver coin by natural wear and tear. As he did not, he could not be said to have been denied any right under the laws of the United States.

MUNICIPAL CORPORATIONS—LIABILITY FOR DEFECTIVE WATERWORKS.—*Held*, that a municipality which maintains a public system of waterworks under a power conferred by the State, is not liable for loss of property by fire caused by defective condition of the waterworks. *Springfield Fire & Marine Insurance Co. v. Village of Keeseville*, 42 N. E. Rep. 405 (N. Y.). See NOTES.

PARTNERSHIP—GOODWILL—RIGHT OF RETIRING PARTNER TO SOLICIT CUSTOMERS OF THE OLD FIRM.—The defendant, on becoming a partner in plaintiff's firm, agreed that the goodwill of the business should remain the property of the plaintiff. *Held*, that plaintiff was entitled, on defendant's retirement from the firm, to an injunction restraining the defendant, his partners, servants, or agents, from applying privately by letter, personally, or by a traveller to any person who was, prior to the dissolution of the firm, a customer of the firm, asking such customer to continue after dissolution of the firm to deal with the defendant, or not to deal with the plaintiffs. *Trego v. Hunt*, 12 *The Times Law Rep.* 80. See NOTES.

PERSONS—DAMAGES RECOVERABLE IN TORT BY MARRIED WOMAN.—*Held*, that, in an action of tort brought by a married woman for personal injuries, her impaired capacity to labor may be considered by the jury in estimating damages. *Harmon v. Old Colony R. Co.*, 42 N. E. Rep. 505 (Mass.). See NOTES.

PERSONS—MARRIED WOMEN—STATUTE OF LIMITATIONS.—In an action for personal injuries to a married woman where the husband has to be made a nominal party, it was *held* that the action was not barred, though the statutory time had elapsed, since married women are expressly given a longer time by the statute. *Fink v. Campbell*, 70 Fed. Rep. 665.

This case presents an example of the effect of the removal of the disabilities of married women, without at the same time giving them the corresponding burdens. 2 Wood on Lim. § 240.

**PERSONS — OBLIGATION OF HUSBAND TO SUPPORT WIFE AND CHILD LIVING APART FROM HIM.** — Where, pending proceedings on a petition for divorce by a wife who with her minor daughter is living apart from her husband, temporary alimony is allowed, the court will presume such alimony was meant to include a physician's bills for services to the wife and child, but anyway the husband cannot be charged without showing a contract by him to be so charged. *Hyde v. Luening*, 65 N. W. Rep. 536 (Mich.).

As the petition for divorce ultimately was dismissed, thus showing she left her husband without cause, the decision seems unquestionable. Had she left with cause, it is doubtful if the physician could have recovered for necessary attendance on the child, though for such attendance on the wife, generally speaking, he could. *Reynolds v. Sweetser*, 15 Gray, 78, holds that a wife leaving her husband with proper cause carries with her his credit, so as to make him responsible for the necessary expenses of both. This decision is due to the Massachusetts doctrine that a father is liable for necessities furnished to his infant child without express contract on his part. At the common law no such liability accrued from the mere duty to support, which was regarded as a moral and not a legal duty. *Shelton v. Spruitt*, 11 C. B. 452. The Massachusetts court thought it a legal duty. There are other decisions holding the duty a legal one. 79 Ia. 151, and cases cited. But whether we follow the strict common law doctrine or not, the decision in the principal case would seem correct.

**PROPERTY — CONVEYANCE OF AN EXPECTANT ESTATE.** — A son, for valuable consideration, executed a deed purporting to pass all the interest in his father's estate which he then had, or might be entitled to on his father's death. *Held*, that such conveyance of a bare possibility, not coupled with an interest, was void. *McCall's Administrator v. Hampton et al.*, 32 S. W. Rep. 406 (Ky.). See NOTES.

**PROPERTY — COVENANT OF WARRANTY — LIABILITY OF REMOTE WARRANTOR.** — A. conveyed land to B. by warranty deed, reciting a consideration of \$5,000. Really but \$500 was paid. B. conveyed to C., and C. to D. D. was ejected by the possessor of a title paramount to A.'s. D. sued A., and claimed to be entitled to recover the full consideration recited in the deed. *Held*, while a warrantor may show by parol as against his immediate grantee that the consideration was less than that recited in the deed, he cannot show it as against a remote grantee purchasing without notice. *Allison v. Pitkin*, 33 S. W. Rep. 293 (Tex.).

In jurisdictions which limit the damages on a covenant of warranty to the consideration paid, the rule stated in the principal case is well settled. *Greenvault v. Davis*, 4 Hill, 643, 649; *Illinois S. & S. Co. v. Bonner*, 91 Ill. 114. The warrantor is estopped to deny the recital in his original deed, but probably the remote assignee would be allowed to show a real consideration greater than stated in the deed. 3 Sedg. Dam. (8th ed.), 103, (§ 965).

**PROPERTY — DEDICATION — ESTOPPEL.** — *Held*, that the sale of lots as bounding on an unopened street, appearing on the grantor's map, is a complete dedication of that street to the public without acceptance or user, and that the lapse of twenty-three years is not an abandonment. *Mayor of Baltimore v. Frick*, 33 Atl. Rep. 435 (Md.).

In general, to create a public right the public must accept the offer by user or otherwise. But in the cases of a dedication by sale of lots with reference to the grantor's map by the weight of authority the offer is held irrevocable. *Trustees, etc. v. Council of Hoboken*, 33 N. J. L. 13; *Meier v. Portland C. Ry. Co.*, 16 Or. 500; *Eliot, Roads*, 89, 129. Cases of this kind fall into two classes; (1) where a town site is laid out, and (2) where merely a small parcel of land is divided up. In the first class the purchasers of lots may be said to constitute the public. As the doctrine of irrevocability is rested on estoppel, it would seem to be a question, in the second class of cases more especially, whether the purchasers relied on an offer of the road-bed to the public to be used when occasion should justify it, or whether all they bargained for was a private right of way. See Angell on Highways, § 156.

**PROPERTY — DONATIO CAUSA MORTIS.** — Testator, on the eve of departure on a journey for his health, handed certificates of stock to his nephew, saying, "I always intended that for you. . . . I don't know whether I will ever come back or not. . . . I don't think I can get over this disease. . . . I can't expect it." The nephew took the certificates and kept them till after the donor's death, which, though it did not occur till his return from the journey, was due to the illness of which he complained. The certificates had no form of assignment indorsed on them. *Held*, a valid gift *causa mortis* was shown. *Leyson v. Davis*, 42 Pac. Rep. 775 (Montana).

The case is a plain one, as the gift was meant to be complete, the certificates were delivered, and the donor failed to recover from the illness from which he contemplated



death at the time of his gift. The learned and lengthy discussion by the court, which cites authorities from the times of Justinian to our own, makes the case interesting.

**PROPERTY — EJECTMENT — POSSESSION.** — *Held*, that, where title by descent was established by neither party, prior possession would prevail, and that building monuments about the land, which could not be fenced, and bringing lumber on it to build, was sufficient possession for this purpose, even though insufficient to establish title by adverse possession. *Mission of Immaculate Virgin v. Cronin*, 36 N. Y. Supp. 77.

The distinction here made between two kinds of possession, as though a physical difference existed, is becoming quite common in the courts. It is generally thrown off, as it is here, by way of *dictum*, and is neither a real nor a desirable one to establish. See *Hunter v. Starin*, 26 Hun, 529, and *Wheeler v. Spinola*, 54 N. Y. at p. 387. No such distinction is recognized in Pollock on Possession. See Part II. chap. iii. § 17. The basis of the decision in this case is thoroughly well established law. Tyler on Ejectment, chap. iv.

**PROPERTY — FIXTURES — VENDOR'S LIEN AS AGAINST MORTGAGEE.** — On a sale of mortgaged property, the vendors of machines placed in a mill partly before and partly after the mortgage, set up as a lien the condition of the purchase that title should remain in them until payment. The machines were held in place by bolts. *Held*, since they were placed in the building by the mortgagor to carry out its purpose, and were essential to its completeness, all the machines passed to the mortgagee. *Cunningham v. Cureton*, 23 S. E. Rep. 420 (Ga.).

Three views are held on this question: one, that the lien on the fixtures prevails even against a mortgage subsequent to their annexation; *Tift v. Horton*, 53 N. Y. 377; another, in agreement with the principal case; *Clary v. Owen*, 15 Gray, 522; and a third, that only those fixtures annexed prior to the mortgage pass by it; *Davenport v. Shants*, 43 Vt. 546. The last, it is submitted, is the correct view, since it gives the mortgagee the security of all on which he advanced his money, and at the same time protects, in part at least, the contract of the mortgagor with the vendor.

**PROPERTY — WILLS — ADEMPMENT.** — The testator devised his interest in a farm to defendants, and his personal property to plaintiff. Before the execution of the will the testator had contracted to sell the farm for \$1,600 payable after his death, interest meanwhile payable to himself. After the execution of the will testator executed a deed to the vendee, and took the vendee's promissory note for \$1,200 payable in one year. At the testator's death the note, though due, remained unpaid. *Held*, the devisees of the land were entitled to the note. *Frick v. Frick*, 33 Atl. Rep. 462 (Md.).

When a testator devises land which at the time of the execution of the will he is under contract to convey, he is held to intend that the devisee shall take not merely the legal title to the land, but also the testator's rights under the contract of sale. Hence, if the testator dies, — the contract of sale remaining executory on both sides, — the devisee takes the land and will be entitled to the purchase money on the execution of the contract. *Wright v. Minshall*, 72 Ill. 584; *Woods v. Moore*, 4 Sandf. 579; *Drent v. Vause*, 1 Y. & C. Ch. 580. If the testator has, during his life, conveyed the legal title to the vendee leaving the vendee's part of the contract executory, it must follow that the devisee will still be entitled to the testator's contract rights against the vendee, i. e. to collect and retain the purchase money. Further, it would seem that the devisee should succeed to the testator's rights against the vendee, even though those rights have been modified by agreement between the testator and vendee subsequent to the execution of the will. In the principal case, if the transaction at the time the land was deeded to the vendee ought to be regarded as an entirely new contract, rescinding the former contract, rather than as a mere modification of the old contract, it is difficult to reconcile the decision with *Pattison v. Pattison*, 1 Myl. & K. 12.

**STATUTE OF FRAUDS — INCORPORATION BY REFERENCE.** — Defendant's real estate agent wrote him a letter informing him of an offer, but omitting the name of the proposed purchaser. Later the agent wrote to the defendant's solicitor as follows: "At Mr. Peter's request I send you the name of the purchaser of the above. It is Mr. H. Burlinson." Both notes were signed by the agent. In an action to enforce specific performance, *held*, the letters cannot be connected so as to satisfy the Statute of Frauds. *Potter v. Peters*, 72 L. T. Rep. 624. See NOTES.

**SURETYSHIP — DISCHARGE OF SURETIES.** — By the body of a bond, A., B., and C. were named as sureties, C.'s liability being fixed at £50. After the signing by A. and B., C. signed, and added after his name "£25 only." *Held*, this released the liability of A. and B., being a non-compliance with the conditions on which A. and B. signed.

And since C. only agreed to enter into a joint obligation, he is discharged also. *Ellis-mere Brewery Co. v. Cooper et al.*, [1896] 1 Q. B. 75.

The case is clearly right, but is interesting as an unusual application of the well settled rule indicated in the opinion, that an obligee cannot hold sureties when the execution is manifestly not in conformity with the conditions specified in the body of the instrument. See Brandt on Suretyship, § 411, for a collection of the authorities.

**TORTS — CONTRIBUTORY NEGLIGENCE. — DUTY OF PERSON CROSSING ELECTRIC STREET CAR LINES.** — Plaintiff's intestate alighted from defendant's street car, and attempted to cross the other track behind the car, without looking for cars on this track. He was struck by a passing car and killed. The lower court charged the jury that the rule in regard to street railways was the same as that applied to steam railways; if the deceased by looking could have seen the approaching car, his omission to look was, as a matter of law, contributory negligence. *Held*, error. Inasmuch as electric street cars run with less noise than steam cars, are within better control of those running them, and their approach is less apt to attract attention, it is a question for the jury whether an omission to look and listen before crossing the track is negligence or not. *Doberst v. Troy City Ry. Co.*, 36 N. Y. Supp. 105.

The New York Supreme Court does not seem inclined to extend the application of its peculiar doctrine of "negligence as a matter of law" from failure to look and listen at a railway crossing. The inference of negligence as a fact from such conduct is doubtless less strong in the case of street railways than of steam railways, and probably if the case is carried up the Court of Appeals will take the same view of it.

**TRUSTS — BREACH — LIABILITY OF TRUSTEE.** — A trustee received a bribe of £300 for investing £3,000 of trust funds in certain securities. *Held*, (1) the trustee must account to the *cestui* for the bribe, and (2) must make good any depreciation in the value of the securities below £3,000, the purchase price. *In re Smith*, [1896] 1 Ch. 71.

It is well settled that a trustee will not be allowed to make use of his position as trustee as a source of profit for himself. Where a trustee received a bribe to resign his position and to recommend another as his successor, the trustee was held accountable to the *cestui* for the bribe received. *Sugden v. Crosland*, 3 Sm. & Gif. 192. On the second point decided in the principal case there seems to be no direct authority. If a trustee wrongfully invests part of the trust fund in a stock which appreciates and part in a stock which depreciates, in an action against him for breach of the trust, he cannot offset the gain to one fund against the loss to the other, but will be charged with the loss on the one fund undiminished by the gain on the other. *Wiles v. Gresham*, 2 Drew, 258. The principal case goes but a step beyond this. The trustee's liability in case there is a depreciation in the value of the trust securities below the purchase price, will not be diminished by the £300 bribe which he has been compelled to pay over into the trust fund.

**WILLS — EFFECT OF LEGATEE CAUSING DEATH OF TESTATOR — PROCEDURE.** — Plaintiff, claiming land as one of testator's heirs at law, brought an action for partition against the defendant, the devisee under testator's will, alleging will to be void because defendant poisoned testator to realize the benefits of the will. *Held*, the killing of a testator by a devisee for the purpose of realizing under a will does not render the devise void, but merely authorizes equity to deprive the devisee of the property devised. *Ellerson v. Westcott*, 42 N. E. Rep. 540 (N. Y.). See NOTES.

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## REVIEWS.

**MERWIN ON EQUITY.** — It is a matter of regret that it could possibly be inferred from the review of this book published last month that Mr. Merwin's editors had not given credit to the sources used in the preparation of their note on Privacy. As a matter of fact credit was given, and it was far from the intention of the reviewer to imply the contrary.



COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, HISTORICAL AND JURIDICAL. By Roger Foster. Vol. I. Boston: The Boston Book Company. 1895. pp. viii, 713.

Mr. Foster has undertaken a great work, great both in size and in importance. One volume has already appeared, and although this is a book of some 700 pages, yet such is the fulness with which the author has treated the Constitution, that the volume is confined to a discussion of merely the preamble and the first three sections. Notes and appendices, throwing side lights and bringing out historical settings, have added to the mass of materials which go to make this work a searching commentary. In order to arrange all this matter in a workable system the author has, after a considerable Introduction, taken up the clauses of the Constitution in their order, and grouped his observations about these texts. Sometimes, as in the question of impeachment, clauses scattered through the instrument, but bearing on the topic in hand, are collected and treated under one heading. Even with this systematic arrangement the work will need a careful index.

It is difficult to say how valuable this will be as a law book. It may be that the lawyer is not expected to rely on "commentaries historical and juridical," and indeed, so far as can be gathered from this first volume, the work is more for the student of political organizations and constitutional history than for the constitutional lawyer. To be sure, this volume hardly offers a fair test, as the first sections of the Constitution deal with political rather than with legal questions; yet when under the second section the author has an opportunity to deal with the question of direct taxes, he does so in the attitude rather of a historian than of a legal commentator. Moreover, in the introductory chapter, the origin of the power which our courts possess to deal with questions of constitutionality is indicated only by a passing remark here and there, whereas, were this intended to be a law book, it would have given more attention to this subject, which is at the foundation of all such judicial action. Whether future volumes may develop a more legal character or not, the work nevertheless cannot but be of great advantage to the lawyer in bringing out the historical aspect of the Constitution, for the element of interpretation which enters so largely into questions of constitutional law would often amount to little more than guess-work, were it not for the assistance afforded by history.

In spite of its fulness, the book reads easily. The expositions are clear, and the argumentative comments on questions of secession and on the political nature of the Constitution are forcible, and yet tempered by a just regard for all considerations. Not the least valuable part of the book is the interesting and often rare matter found in the notes.

H. W.

ELEMENTS OF DAMAGES. A Handbook for the Use of Students and Practitioners. By Arthur G. Sedgwick. Boston: Little, Brown, & Co. 1896. (The Students' Series.) pp. xvi, 336.

"This book," a companion volume to Beale's Cases on Damages, "is an attempt to review the law of damages, to state its principles so far as possible in the form of rules or propositions of law, such as a court might lay down to a jury, . . . and to illustrate these by the cases from which they have been drawn." The author, however, has not confined himself merely to stating rules and giving illustrations, but, by discussing principles

very thoroughly before laying down propositions, has greatly improved on this otherwise Procrustean method. The novel result is a combination of what is best in several systems, of discussions not only smooth and perspicuous, but readable and attractive, and of peculiarly felicitous propositions and terse, pertinent abstracts, the whole treated in a manner agreeable, and with a decided charm of its own.

In substance, too, this work, helpful alike to students and practitioner, forms a notable addition to the valuable series of which it is the latest. Mr. Sedgwick's knowledge of his, one might almost say, hereditary subject, is of the widest, and his recognition of the scope of a work of this character is thorough and well sustained. It is in no sense an abridgment of the exhaustive "Sedgwick on Damages," but a treatment based on very different considerations, with other purposes in mind. One is not, perhaps, ready to assent to all that is said; but even where Mr. Sedgwick's views do not convince, they fail, not through his shortcomings, but through their own inherent weakness. The undesirable distinction between recovery of consequences in contract and tort is, it would seem, somewhat overstated, in view of the case of *Welch v. Anderson*, 61 L. J. (N. S.) Q. B. 167, while the author's adherence to the doctrine of exemplary damages might well be thought unfortunate. The topical arrangement of the work, moreover, is too conservative, rather unscientific, and not particularly happy for the student's purpose; but these possible blemishes should avail little when weighed in the balance with its many positive virtues.

D. A. E.

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THE LAW OF COLLATERAL AND DIRECT INHERITANCE, LEGACY, AND SUCCESSION TAXES. By Benj. F. Dos Passos, late Assistant District Attorney, New York County. Second edition. St. Paul, Minn.: West Publishing Co. 1895. 8vo, pp. xxii, 654.

Five years ago the first edition of this work was published, and it speedily became the standard treatise on a subject of constantly growing importance. Inheritance tax laws have since been enacted in seven more States. As a result, there is much new material, all of which is incorporated in the present volume. The appendix contains a valuable collection of statutes.

R. G. D.

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AMERICAN ELECTRICAL CASES, with Annotations. Edited by William W. Morrill. Albany: Matthew Bender. 1895. Vol. IV., 1892-1894. 8vo, pp. xxvi, 911.

The work of collecting all the leading American cases which deal with electricity in its practical uses has now been brought nearly up to date. This volume, like its predecessors, is admirably arranged for reference, and with them constitutes an exceedingly valuable series. Nowhere else can one find the law of the telegraph and the street railway so conveniently set forth.

R. G. D.

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THE GREEN BAG. Vol. VII., 1895. Boston: The Boston Book Co.

The latest bound volume of this clever law magazine has the same general appearance, both within and without, as had the previous volume. The high tone of its articles is maintained, and its sketches of courts, biographies of jurists, and general legal miscellany make it as interesting and amusing to the profession as ever.

H. C. L.



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## CONFLICTING RIGHTS OF TELEPHONE LINES AND SINGLE TROLLEY ELECTRIC RAILWAYS IN THE HIGHWAYS.

THE electric lines which are ordinarily found in the highways may be divided into three classes:—

1. Wires for the transmission of intelligence by electricity, including telegraphs, telephones, fire alarms, police signals, and a few others of similar use. These wires transmit an electric current of very slight potential, and are wholly harmless.

2. Wires for the transmission of electric power for the operation of electric railways. These wires are the overhead trolley wires, and transmit a current of about 500 volts, and are considered harmless to human beings so far as permanent ill effects from shocks are concerned, except in case of very weak or nervous people. The current is strong enough, however, to give a serious temporary shock to human beings, and is often fatal to horses.

3. Wires for the transmission of electric light, heat, and power for mechanical purposes. These wires transmit currents of very high potential, which in case of the direct electric light current is generally in the neighborhood of 2,500 to 3,000 volts, and in case of alternating currents is of much greater destructive force. The electric light current is fatal to human life if taken in its full strength.

There are occasional conflicts between all these various kinds of wires as to the occupation of the highways, for the stronger current of one kind will, under circumstances of proximity, affect

the operation of the weaker current, but the chief conflict is that which has arisen between the telephone lines and the single trolley electric railway, and this article will be limited to the investigation of the respective rights of these two classes of lines in the highways.

The main features of the construction of telephone lines and electric railway lines are now familiar to every one, but there is one point which may not be wholly understood, and which is important in the following discussion. The telephone line in its original form of construction—and the same form is in use at the present time in many places—does not contain a complete metallic circuit, by which the current can start from the speaking telephone or transmitter, travel to the hearing telephone or receiver, and then return to the speaking telephone, but the wire, after reaching the hearing telephone, is led to some adjacent gas or water pipe in the building, or other convenient conductor, over which the current can pass into the ground. It is evident that this connection with the ground through the gas pipe or other conductor forms an economical mode of construction, but it has an objection,—that it furnishes a suitable means for a stronger electric current to travel up the conductor into the hearing telephone, just as it does for the telephone current to travel down the conductor into the earth. Hence comes the difficulty with the electric railways, for the electric railway, built according to the single trolley system, uses in a similar way the ground for the return current; that is, the dynamo at the power station generates the electric current which flows out over the trolley wire, thence into the trolley on the car, and by a wire in the trolley pole down through the controllers into the motor in the car, and thence by the car axle and wheels and rails into the ground.

The injury which the electric railway current does to the use of telephones is of two kinds:—

1. Conduction, as it is technically called, or leakage. The comparatively strong current of the trolley car, after escaping into the ground, finds an easy path along the gas or water pipes in the street, and into private premises, until it reaches the point at which the telephone wire is attached, thence up the wire into the telephone and through it, to the central exchange. This passage of the railway current into the telephones produces buzzing and cracking noises in the telephones, confuses the sound of the voices, and renders the conversation unintelligible. It also rings the call bells



and causes the annunciators in the exchange to fall when no call had been made, and does other mischief.

2. Induction. This is a more obscure and difficult phenomenon, but it appears that when the wires of a telephone are near the trolley wire and parallel to it the strong current of the trolley, varying in its strength as the cars are started or stopped, or from other causes, *induces* a current on the telephone wires which varies as the trolley current does, and thus interferes with the telephone current and causes confusing noises in the telephone.

As soon as the electric railway was introduced into the streets, it became evident that the effect of these two kinds of interference was wholly to destroy the usefulness of the telephone. Customers would not continue to use telephones when their ears were greeted with a pandemonium of strange noises, amid which the words of their interlocutor were unintelligible or very confused. There were three more or less efficient modes of remedying the trouble: —

1. The use of the double trolley system on the railway, that is, having two trolley wires over the track and two trolley poles on every car, so that the current would pass from one wire and trolley into the car motor, and then return to the other wire, and so back to the generator. By this system, the railway current is not discharged into the ground at all.

2. The use of an all-metallic circuit for the telephone lines, so that there should be no chance for the railway current to get at the telephone lines.

3. The McCluer device, so called, which is in effect a single return wire for several telephone lines. This device is cheaper than a metallic circuit for every line, and may be so arranged as to obviate to a great degree both kinds of disturbance.

The question before the companies was, therefore, which company must make the change. Had the telephone company the right to compel the electric railway to adopt the double trolley system on penalty of ceasing operations? Had the electric railway company the right to compel the telephone company to adopt the all-metallic circuit, or McCluer device, on the same penalty?

Almost immediately upon the installation of the earliest electric railways followed the first suit brought by the telephone companies to restrain the electric railways from using the highways. In January, 1889, a case was decided on this point in the Court of

Common Pleas for Summit County, Ohio,<sup>1</sup> and in June of that year a case in the Chancery Court of Chattanooga, Tenn.,<sup>2</sup> brought up the same question. These cases, however, were merely skirmishes. The first great action was begun at Albany, N. Y., in the fall of the same year, and was the case of Hudson River Telephone Co. *v.* Watervliet Turnpike & Railway Co. In November of this year, the telephone company succeeded in getting a temporary injunction against the operation of the electric road until the case could be heard on its merits. The court (Mayham, J.), in granting this injunction, expressly declined to go into the merits further than to hold that it was a fitting case for a temporary injunction under the New York Code for reasons of only local importance. The court, however, in ordering the injunction, required the telephone company to give bonds in the sum of \$10,000 to protect the defendant in case it succeeded at the final hearing of the case. The care of the court to make clear that the granting of the temporary injunction was in no sense a determining of even the *prima facie* merits of the case, is shown by its language: "In reaching a conclusion that a temporary injunction should be granted on this motion, I have intentionally avoided any discussion or determination of the somewhat new but very important questions involved in this action, which should have a careful trial upon their merits, and a speedy determination."<sup>3</sup>

This decision was followed by an appeal to the General Term of the same court by the railway company. The appeal was decided in the February term, 1890,<sup>4</sup> and the merits of the case were considered, the court taking the view that both parties were lawfully in the streets, and that, as the telephone had a prior franchise from the authorities, this franchise should be protected; but as the difficulty might be obviated by a metallic circuit for the telephone, such a circuit must be built so that both parties could use the street, and the railway company must pay the cost of constructing the metallic circuit because it made the metallic circuit necessary. In the Court of Appeals, to which this branch of the case was next taken, the temporary injunction was continued solely on the ground that the granting of it was in the discretion

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<sup>1</sup> Central Union Telephone Co. *v.* Sprague Electric Railway & Motor Co. et al., 2 Am. El. Cas. 307.

<sup>2</sup> East Tennessee Telephone Co. *v.* Chattanooga Electric Street Railway Co., 2 Am. El. Cas. 323.

<sup>3</sup> Pamphlet Opinion of Mayham, J., p. 8.

<sup>4</sup> 56 Hun, 67.



of the court of original jurisdiction, and such discretion could only be reviewed by the General Term. The Court of Appeals, however, gave an intimation of its opinion on the merits as follows: "We have examined with care the questions involved in this case, and we are compelled to say that we entertain very grave doubts whether, upon the facts stated in the complaint and affidavits, any cause of action exists in favor of the plaintiff, and whether the plaintiff has any remedy for the injury of which it complains, except through a readjustment of its methods to meet the new conditions created by the use of electricity by the defendant, under the system it has adopted."<sup>1</sup> The court, however, gave no intimation of the reason for this view.

In the mean time the trial of the case on its merits was being rapidly pushed forward. It went first to a referee to take evidence and find the facts. Numerous experts were examined before him by both parties, with the usual result of conflicting expert testimony in mixing up the case almost beyond comprehension. The referee then proceeded to make a decision which was somewhat unintelligible (Nov. 21, 1890), finding all the material facts in favor of the telephone company; as, for instance, that it would cost much less to change the railway equipment from the single trolley to the double trolley system than it would to change the telephone to an all-metallic circuit, and also that the double trolley system was quite practicable, and yet holding that on the pleadings and the proof the telephone company had not established a cause of action. Why it had not, the referee also left in profound mystery, and on appeal to the General Term of the Supreme Court that court promptly reversed the judgment, discharged the referee, and ordered a new trial.

The leading idea of the General Term in taking this action was the maxim, *Sic utere tuo ut alienum non lædas*. The court says, "The sound and just elementary principle still prevails, that a party must so use his own property as not to injure his neighbor."<sup>2</sup>

Meanwhile street railways all over the United States were being equipped with the single trolley electric system, and it became evident that, whatever the courts might decide, the railway had come to stay and was a great public benefit. It was not long, as time is measured in lawsuits, before the Court of Appeals (Oct., 1892) gave a final and authoritative statement of the law

<sup>1</sup> 121 N. Y. 405, June 3, 1890.

<sup>2</sup> 61 Hun, 152, Sept., 1891.

on the subject as applied in New York,<sup>1</sup> in favor of the railway company. The principle of the decision we will discuss later.

While this case was going through its successive stages in New York, the telephone and electric railway were waging war at other points along the line from New York to Utah. In Cincinnati a lively fight was carried on in the case of City & Suburban Telegraph Association *v.* Cincinnati Inclined Plane Railway Co.<sup>2</sup> The Superior Court upheld the telephone company, but the Supreme Court reversed this decision on the same ground which the New York Court of Appeals adopted. In the United States Circuit Court for the Middle District of Tennessee, a similar fight occurred,<sup>3</sup> and the electric railway came out victorious. In Louisville, Ky., the same point was brought up in June, 1890.<sup>4</sup> Even in Utah, the telephone company tried to occupy the field.<sup>5</sup>

In England the fight broke out in the case of National Telephone Co. *v.* Baker,<sup>6</sup> somewhat after the tide of war had subsided in the United States. Mr. William Sebastian Graff Baker, the defendant, was a contractor who had been employed by the makers of electric railway apparatus in the United States for the purpose of introducing the apparatus in England, and he succeeded in getting the requisite authority from Parliament, and in equipping a tramway for the corporation of Leeds. By his contract with Leeds he was bound to operate the tramway for a trial period, and it was during this period that the telephone company brought suit against him for causing a nuisance to their lines by the operation of his tramway. The court decided in favor of the tramway for reasons which we will examine later.

We have thus seen that the war between the telephone companies and the electric railway companies for the right to occupy the highways with their lines began in the United States about the fall of 1889, and was continued with great energy until the fall of 1892, with results generally favorable to the railways. And the single English case which has been decided on this point reached

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<sup>1</sup> 135 N. Y. 393.

<sup>2</sup> Superior Court, Feb. 12, 1890; Supreme Court, June, 1891, 48 Oh. St. 390.

<sup>3</sup> Cumberland Telephone & Telegraph Co. *v.* United Electric Railway Co., 42 Fed. Rep. 273, May, 1890.

<sup>4</sup> Louisville Bagging Mfg. Co. *v.* Central Passenger Railway Co., Louisville Law & Eq. Court, Pamphlet Opinion.

<sup>5</sup> Rocky Mountain Bell Telephone Co. *v.* Salt Lake Railway Co., 3d Jud. Dist. Utah Terr., Jan. 1890, Pamphlet Opinion.

<sup>6</sup> L. R. 1893, 2 Ch. 186, Feb. 4, 1893.



the same conclusion in 1893. Since that time only one case has been decided on this point in the United States.<sup>1</sup>

Such is the outline of the history of the subject. Now let us examine the various arguments brought forward by the parties to support their claims. These arguments may be divided into two classes, first, those which assume that both companies have equal legal rights in the highways, and seek to find some equity which will turn the scale in favor of the party adducing the argument, and second, those which seek to show some paramount legal right in one company or the other.

One of the earliest points which attracted the attention of counsel and courts was the comparative expense of making such change in either the trolley line or telephone line as would remedy the difficulty. Would it cost more to put an all-metallic circuit on the telephone, or a double trolley line on the railway? The answer to this question of fact evidently depends upon the circumstances of each case. The referee in *Hudson River Telephone Co. v. Watervliet Turnpike & Railway Co.*, found that in that case it would be less expensive to put in the double trolley system. In other cases the change to an all-metallic circuit for the telephone has been considered cheaper than to change a single trolley railway to a double trolley.<sup>2</sup> The court in the case cited in the note treated the parties as having equal rights in the use of the streets for their lines, and said that, as the cheaper mode of obviating the difficulty was for the telephone to put in a return circuit, it would have to adopt that course. The variable test of expense, however, was felt to be a very imperfect means of solving the problem. In one case it was well said, "It is immaterial on which party the expense of the change may fall more heavily. It is a question of legal right."<sup>3</sup>

Another attempt to adjust the difficulty was based on priority of occupation of the streets. This claim the telephone companies asserted with great vigor.<sup>4</sup> It of course assumes that both parties

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<sup>1</sup> *Cumberland Telegraph & Telephone Co. v. United Electric Railway Co.*, 29 S. W. Rep. 104.

<sup>2</sup> *Cumberland Telephone & Telegraph Co. v. United Electric Railway Co.*, 42 Fed. Rep. 273. Opinion *sub fine*.

<sup>3</sup> *Cincinnati Inclined Plane Railway Co. v. City & Suburban Telephone Association*, 48 Oh. St. 390.

<sup>4</sup> See brief of Edwin A. Countryman and John A. Delehanty, in *Hudson River Telephone Co. v. Watervliet Turnpike & Railway Co.*, 135 N. Y. 393: "The plaintiff being first in possession is first in law and equity."

have equal legal rights in the streets, and the argument is, in effect, that if the telephone, having a legal right to use the streets, does so, and later the railway, having also a legal right, attempts to use the streets, the prior occupation by the telephone company is a sufficient equity to compel the railway to adopt some system that does not interfere with the telephone. This is a strong argument on the equitable principle *qui prior est tempore, potior est jure*, and undoubtedly would have been decisive in the matter, as it has been held in cases between electric light lines and telephone lines, and between various electric light lines,<sup>1</sup> had it not been for the decisive principle which we shall consider later.

This ground of priority was relied upon somewhat by the court in *Hudson River Telephone Co. v. Watervliet Turnpike & Ry. Co.*, when the case came before the General Term of the Supreme Court on its merits.<sup>2</sup> The court says, "Again it is worthy of consideration that the plaintiff established its plant and prosecuted its business for some years before the use of electricity was known as a motive power for railroads," and cites *Pomeroy on Equitable Jurisprudence*, § 114, that as between parties having only equitable interests, if their equities are in all respects exactly equal, priority of time will give the better equity. The Court of Appeals, however, did not agree with this reasoning.

Another argument which the telephone companies have brought against the electric railway is the danger of accidents caused by it, and its tendency to frighten horses. This argument belongs more accurately to the question whether the electric railway is a proper mode of using the streets for public travel. It is enough to say here that the argument lacks a sufficient foundation in fact to give it much weight.<sup>3</sup>

The last of the arguments in favor of the telephone line, based on an equality of rights of both parties in the streets, is that the railway company is bound so to use its property that its neighbor, the telephone, shall not be injured by the use. The maxim *Sic*

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<sup>1</sup> *Western Union Telegraph Co. v. Guernsey & Scudder Electric Light Co.*, 46 Mo. App. 120; *Nebraska Telephone Co. v. York Gas & Electric Light Co.*, 27 Neb. 284; *Paris Electric Light & Railway Co. v. Southwestern Telegraph & Telephone Co.*, 27 S. W. Rep. 902; *Bell Telephone Co. v. Belleville Electric Light Co.*, 12 Ont. Rep. 571; *Rutland Electric Light Co. v. Marble City Electric Light Co.*, 65 Vt. 337; *Croswell on Electricity*, §§ 223-225.

<sup>2</sup> 61 Hun, 157.

<sup>3</sup> *Hudson River Telephone Co. v. Watervliet Turnpike & Railway Co.*, 135 N. Y. 403; *Louisville Bagging Mfg. Co. v. Central Passenger Railway Co.*, 23 S. W. Rep. 592.



*utere tuo ut alienum non lædas* is invoked by the telephone companies as decisive of the case. Its argument is that it is legally and peaceably in the possession and operation of its plant in the highway under grants from the proper authorities, when the railway company establishes its lines in the streets and discharges its electric current into the earth in such quantities and of such voltage as to create a nuisance to the operation of the telephone line. This argument was considered in the English case above referred to<sup>1</sup> at some length. The court (Kekewich, J.) says: —

“I cannot see my way to hold that a man who has created, or, if that be inaccurate, has called into special existence an electric current for his own purposes, and who discharges it into the earth beyond his control, is not as responsible for damages which that current does to his neighbor as he would have been if instead he had discharged a stream of water. The electric current may be more erratic than water, and it may be more difficult to calculate or to control its direction or force, but when it is once established that the particular current is the creation of or owes its special existence to the defendant, and is discharged by him, I hold that if it finds its way on to a neighbor's land and there damages the neighbor, the latter has a cause of action.”

The court then proceeds to consider what may be said in avoidance of the legal liability above stated, and says: —

“First, they say that the plaintiff [telephone company] might, by an alteration of their system, that is, by the adoption of what is known as the metallic return, prevent the disturbance complained of. . . . The first answer is, to my mind, without foundation. The man who complains of his land being thrown out of cultivation by the incursion of water escaping from his neighbor's reservoir must not be told that he has no right of action because if he had interposed a wall, or otherwise taken care to protect himself, the water would not have reached his land. He is using the land in a natural way, and is not bound to take extraordinary precautions, and is entitled to rely on his neighbor also using his land in a natural way, or, if he uses it otherwise, taking extraordinary precautions to prevent damage to others therefrom. There is no doubt a body of evidence to show that a system different from that adopted by the plaintiff has been adopted elsewhere with advantage, and may probably prove to be the most convenient, though more expensive for them, but the evidence also proves that their present system has been largely adopted and is approved by many competent to form an opinion. It has also the merits of economy. They are carrying on their business lawfully, and in the

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<sup>1</sup> National Telephone Co. v. Baker, L. R. 1893, 2 Ch. 186.

mode which they deem best, and I cannot oblige them to change their system because they might thereby probably enable the defendants to conduct their business without the mischievous consequences now ensuing. True it is that the analogy introduced above fails to this extent, that the plaintiffs are using the land for an extraordinary purpose, but admittedly it is a lawful purpose, and though under an obligation to obviate mischief from their own operation, they are under none, in my judgment, to protect themselves from the defendants or others. The outflow from one reservoir might easily destroy another, but so far as I am aware there is no principle or authority in English law for rejecting a claim for damages by the owner of the latter, on the ground that his user, as well as that of the neighboring owner, was extraordinary."

The court then decides the case in favor of the electric railway on another ground. i. e. statutory authority from Parliament.

I have quoted fully from the foregoing opinion, because I think it expresses the strong argument of the telephone company on this point very clearly. It is difficult to frame any answer to it, supposing the two parties to be on equal terms in the highways. The case in this aspect is very analogous in principle to a case decided in England in 1889,<sup>1</sup> where the facts were that the plaintiff had a wine cellar in the rear of his house, separated from the back of a hotel kept by the defendants by a party wall only. The defendants put up a stove for cooking in the rear of their hotel, and the heat coming through the wall destroyed the usefulness of the plaintiff's cellar for the storage of wine, and an injunction was granted against the defendants using their stove, the court placing its decision upon the ground that a man must not so use his property as to injure his neighbor. A similar principle has often been maintained in cases where smoke or gases are discharged over neighboring land and into neighboring houses, causing a nuisance.<sup>2</sup> This argument, however, loses its importance in the United States from the fact that there is, as we shall see later, a decisive principle which overrules all the arguments in favor of the telephone companies.

Coming now to the second class of arguments, i. e. those in which one party or the other claims a paramount right in the highways, we find first an argument put forward by the telephone com-

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<sup>1</sup> Reinhardt v. Mentasti, L. R. 42 Ch. Div. 685.

<sup>2</sup> McClung v. North Bend Coal & Coke Co., 9 Oh. Cir. Ct. Rep. 259; Kirchgraber v. Lloyd, 59 Mo. App. 59; Frost v. Berkley Phosphate Co., 20 S. E. Rep. 280; Peacock v. Spitzelberger, 29 S. W. Rep. 877.



panies that they have received from the municipal authorities grants of the right to set their poles and string their wires in the highways, and that this franchise cannot be impaired by a later grant to the electric railway company. This claim, which seems strong at first glance, in reality contains the principle which has subverted the whole telephone case. The claim was strongly asserted by the telephone company in the case of *City & Suburban Telegraph Association v. Cincinnati Inclined Plane Railway Co.*, and the case was in fact decided by the Superior Court in favor of the telephone company on this ground. The court says:—

“To this the plaintiff replies that by virtue of its grant, it acquired, before the defendant had a right to use electricity as a motive power, a vested interest in the telephone system as it now operates it, with a grounded circuit, and that not even the Legislature of the State could take away from it or injure this franchise on the faith of which it has expended so much labor and capital.”<sup>1</sup>

And the Superior Court adopted this claim, with the modification that the Legislature *might* take away the telephone company's franchise, but would not be presumed to intend to do so, and that, as its grant to the electric railway of a right to use electricity as a motive power would be satisfied if the double trolley system were used, which would not interfere with the telephones, this mode of use must be presumed to be intended by the Legislature. This view, however, was not upheld by the Supreme Court of that State on appeal in the same case.<sup>2</sup>

This brings us at last to the important principle upon which two courts of last resort in two most influential States, New York and Ohio, have rested their decisions in favor of the electric railway, and which is in reality decisive in the United States against the claims of the telephone company, viz. that the primary use of the highways is for public travel, and that any other use must be subordinate to this, and consequently a person or company using the highways for such subordinate use cannot complain if some novel mode of public travel interferes with his or its user of the highways. This important principle is followed by the corollary that the telegraph and telephone, not being forms of public travel, if they make use of the highways for their lines, must do so in

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<sup>1</sup> Pamphlet Opinion of Hon. W. H. Taft, Feb. 12, 1890.

<sup>2</sup> *Cincinnati Inclined Plane Railway Co. v. City & Suburban Telegraph Association*, 48 Oh. St. 390.

subordination to the use of the highways for travel by the public. This principle, as stated in the important case of *Hudson River Telephone Co. v. Watervliet Turnpike & Railway Co.*,<sup>1</sup> is as follows: —

"The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use unless a contrary intent is clearly expressed. The inconvenience and loss which others may suffer from the adoption of a form of locomotion authorized by law, which is carefully and skilfully employed, and which does not destroy or impair the usefulness of the street as a public way, is not sufficient cause for a recovery, unless there is some statute which makes it actionable."

The same principle is well expressed in the Ohio case: —

"The dominant purpose for which streets in a municipality are dedicated and opened is to facilitate public travel and transportation, and in that view new and improved modes of conveyance by street railways are by law authorized to be constructed, and a franchise granted to a telephone company of constructing and operating its lines along and upon such streets is subordinate to the rights of the public in the streets for the purpose of travel and transportation."<sup>2</sup>

This leading principle, that the streets are primarily for public travel, is an extremely important one, and it must be regarded as very fortunate that the courts have protected it so thoroughly in these cases. The same principle has also been well asserted in another direction, when the courts have pronounced that the right of public travel along the highways is paramount even to the crossing of the highways by steam railroads. Of course, for reasons of public advantage, steam railroads are by statute expressly given the right to lay their tracks across the highways, and from the necessity of the case steam trains have the right of way at such crossing, as against travel on the highway; but with these exceptions the paramount right of the public to travel over the highways remains, and therefore, when the question arises as to the right of an electric railway to lay its tracks across the steam railroad tracks on the highways, in the absence of express statutory restrictions, the electric railway may cross with its tracks, and its

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<sup>1</sup> 135 N. Y. 393.

<sup>2</sup> *Cincinnati Inclined Plane Railway Co. v. City & Suburban Telegraph Association*, 48 Oh. St. 390.



overhead wires, provided they are so constructed as not to interfere with the operation of the steam railroad, and it may do this without the permission of the steam railroad and against its wish, because it does so as an authorized form of travel upon the highways.<sup>1</sup>

As the right of public travel is thus paramount upon the highways, it follows that the telephone and telegraph lines take their permission from the legislature or municipal authorities subject to this right of travel. This condition will be implied if it is not expressed,<sup>2</sup> but it is generally expressed in the statutes which give the telephone and telegraph companies the right to use the streets for their lines.<sup>3</sup>

This being the case, the whole problem of the relation of the telephone lines to the electric railway on the highways is solved at once. To use the language of the court in the final decision on the merits of *Hudson River Telephone Co. v. Watervliet Turnpike & Railway Co.*,<sup>4</sup>—

“There is no question of prior equities involved. It is a matter of strict legal right. Neither priority of grant nor priority of occupation can avail either party. The plaintiff [the telephone company] has a franchise which is entitled to protection, but the prime difficulty it encounters grows out of its subordinate character. It has been given and accepted upon the express condition that it shall not obstruct or interfere with the enjoyment by the defendant of its franchises.”<sup>5</sup>

The telephone companies seem to have acquiesced in the subordinate position on the highways assigned to them by the courts in the foregoing decisions, and have very generally protected their instruments by all-metallic circuits in places where there was likely to be interference with the current of electric railways. This change in construction of the telephone plant has resulted in improved service to the telephone customers so that the introduction of the electric railway may be said to be indirectly a benefit to the users of telephones as well as a direct benefit to the passengers on the railways.

<sup>1</sup> *West Jersey Railroad Co. v. Camden, G. & W. Railway Co.*, 29 Atl. Rep. 423.

<sup>2</sup> *Hudson River Telephone Co. v. Watervliet Turnpike & Railway Co.*, *supra*.

<sup>3</sup> See statutes collected in § 61 of *Croswell on Electricity*.

<sup>4</sup> 135 N. Y. 393.

<sup>5</sup> To the same effect is *Cincinnati Inclined Plane Railway Co. v. City & Suburban Telegraph Association*, 48 Oh. St. 390.

A new phase of the case, however, has recently cropped out, which may be the cause of further litigation, although it is not yet in the courts. It has been shown by experts that the effect of the discharge of the electric railway current into the ground near iron pipes such as are used for carrying the underground wires of the various electric companies, as well as water pipes, gas pipes, steam heating pipes, and similar conduits, is to produce electrolysis of the metal, accompanied in case of electric conduits by detriment to the insulating and protecting material. Whether this damage will result in an attempt to compel the electric railways to change their method of construction, and if so what the decision of the courts will be upon the rights of the parties, it is yet too early to predict. It is, however, safe to say that the courts will adequately protect the fundamental principle so important to the community, and so well defended in the cases cited above, that the primary use of public highways is for public travel.

*Simon G. Croswell.*



## OF THE NATURE OF AGENCY.

THAT the sphere of personality is not to be limited in even our usual and less accurate conceptions to the sphere of physical presence is becoming more and more evident with each day's advance in the arts of civilization. We now employ so many mechanisms, and they enable us to put forth our energies over such enormous distances, that we have almost ceased to be astonished at our powers. We regard these instruments as being, what in very truth they are, a mere lengthening of our limbs, extensions of the organic self, and this conception, accurate in the domain of daily common sense, is not less accurate in the domain of legal thought.<sup>1</sup> It is similarly true that such self-extension is by no means confined to inorganic means. Men may and do act through other men in accomplishing results, which, when accomplished, are their acts, to be attributed to them rather than to their instrumentalities.

What is meant when it is said that one person acts *through* another? The essential matter, I believe, will be found to be this: that the one conceives a purpose which he intrusts to the

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<sup>1</sup> It has been held that even the definition of the merely physical person must include more than the body and the limbs. *Marentille v. Oliver*, 1 Penn. (N. J.) 379 (1808); s. c. Ames's Cases on Torts, 27. "An injury to the clothes on one's back is a trespass to the person, *Regina v. Day*, 1 Cox, C. C. 207. So is the removal of an ulster from the plaintiff, *Geraty v. Stern*, 30 Hun, 426; or striking a cane in the plaintiff's hand, *Republica v. De Longchamps*, 1 Dall. 111; or cutting a rope connecting the plaintiff with his slave, *State v. Davis*, 1 Hill, S. Ca. 46." Ames's Cases on Torts, 27, n. 3. In *Marentille v. Oliver* it was held to be a battery to the person to strike a horse in the shafts of a carriage in which the plaintiff was riding. This case probably goes to the utmost verge of the law, but it would seem to be correct. The newly invented telautograph, by which a signature may, by an electric device, be duplicated at a distance in the very act of writing, illustrates the same extension of the personality. If by means of the telautograph I should write my name in Boston while actually seated in New York, the signature is as much made in Boston as if I should use a pen two hundred miles in length. But see, however, *State v. Hall*, 114 N. C. 909 (1894). In that case the defendant was indicted in North Carolina for murder. The murder was committed by shooting the deceased across the boundary line between North Carolina and Tennessee. So far as the case holds that the murder was committed in Tennessee and not in North Carolina, it would seem to be erroneous. The act is clearly a continuing act, beginning in one place and completed in another, and cannot be said to have been committed in either place alone. It would seem to have been the part of justice to hold that the defendant had rendered himself amenable to the jurisdiction of both States.

other to accomplish. In the majority of acts, the intent and the efficient energy unite in the same individual; but there is no insuperable obstacle to their separation. In fact, as civilization becomes more intricate, this sort of separation becomes more frequent; and as individual needs become more complex and less easy of satisfaction by the individual himself, action through others becomes more and more necessary, and the forms of such action become more and more complicated.

The possibility of the existence of such relations between man and man is due to the possibility of communication, the means whereby men make known to each other their various thoughts. Whatever be the form which the relations resulting from such a separation of the preconceived idea from the subsequent act may take, it depends upon this communication of ideas. The thinker, after conceiving his purpose, must state it, and the actor must accept that purpose so stated as an end to be accomplished before he can act at all. The thought so expressed on the one hand, and so agreed to be followed on the other, is the very determining element of the relation. Indeed, the relation *is* exactly what this mutual understanding is, neither more nor less. In the ethical and juridical handling of it, the mutual understanding must therefore be constantly regarded and as constantly held to be the norm of construction.

One source of difficulty in practically dealing with this mutual understanding is due to the presence in it, oftentimes, of certain vague and undetermined quantities of custom. Usual exigencies call into being usual means for their satisfaction. The needs of commerce, for example, are the occasion for numerous forms of credit capable of transmission from hand to hand and place to place. These and the like involve within broad limits substantially identical relations. Thousands of dealings are had in which the only observable differences are those of names, dates, and amounts. Thus a certain routine character attaches to them, and they fall into well defined classes. Men assume, without overt expression and often without even mental advertence to the point, that these usual elements enter into their dealings, and transactions of such a character must be interpreted with reference to them.

The nature of the question involved in their construction, however, is not thereby changed. To determine the nature of a given relation of this character, we first ask, What was the mutual



understanding of the parties? If we find present these elements of custom, we may ask further, With reference to what custom did the parties deal? which is the same thing as to ask, What custom did they incorporate into their understanding? Obviously, the last question is precisely identical with the first.

Questions of the understanding of two parties are typical questions of fact, and are usually in our jurisprudence so treated, that is to say, they are usually left to the jury for determination. When, however, these elements of custom enter, they have been frequently arrogated by the court to its own province, and then these questions are called questions of law. The process by which this was effected is plainly visible. In the times of Mansfield and Holt, when the great expansion from the old feudal narrowness into our more modern conditions first began in Anglo-Saxon law, with new and difficult cases of custom, the court not infrequently called in the aid of men familiar with such transactions. Their statements were accepted by the court; they were mentioned in judicial opinions, or included in reporters' statements of fact, and, thereby passing into the books, became precedents, and are now familiar learning.<sup>1</sup>

In all such cases, however, the imperative obligation of following the intention of the parties still obtains, and he who would do justice must recognize that what is called a rule of law is in such cases but a canon of construction. With this in mind, I propose to examine certain simple and typical cases which present the separation of which I have spoken, and which are not infrequently the subject of much confusion.

1. *Suppose that I convey to A certain property which I direct him thereafter to hold to certain uses prescribed by me.*

Here we find the separation of the plan from the execution of it. I have conceived certain purposes which, for various reasons, A undertakes to execute. The effective accomplishment of them is dependent upon the communication established between us.

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<sup>1</sup> For example, the English court frequently consulted with the merchants of London with reference to the custom of merchants, then first obtaining judicial recognition. In *Buller v. Crips*, 6 Mod. 29 (1704), which was the famous case in which Chief Justice Holt undertook to decide that promissory notes were not negotiable instruments, the reporter states that "at another day, Holt, C. J., declared that he desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course." In that case, indeed, the Chief Justice declined to follow their opinion and was in consequence overruled by St. 3 & 4 Anne, c. 9, §§ 1-3 (1704).

B's duty to me and my correlative right against him are exactly defined by my instructions as made known to him by me. As so expressed, these are to hold the property ostensibly as owner, that is, by a legal title during the continuance of the relation, subject however to certain obligations to me as to management. It is a necessarily involved condition of these instructions that the property so held shall be preserved as a distinct and permanent fund.

2. *Suppose I deposit moneys in the bank, and direct the bank to disburse them upon my order.*

Again we find a purpose of one to be accomplished by the act of another, and again we find the relation determined by the instructions that are given by me to the bank. This case differs from the previous one in that, while the bank becomes the owner of the moneys deposited with it, it is under no obligation to preserve them as a specific fund. After it receives the moneys, it owes to its depositor an equivalent sum, and its obligation is to discharge that debt by payment to such persons at such times as the depositor by written order directs.

3. *Suppose I direct A to build me a house, for which, when completed, I am to pay him a stipulated sum.*

For a third time we have the original notion conceived by one mind, and the execution of it left to another; but there are elements obviously distinguishing this case from the two last supposed. Of these the chief is that I am an obligor as well as A. My obligation, which is to pay the stipulated price, is however contingent upon two things; (1) the completion of the work, and (2) its conformity to the instructions contained in the agreement. This makes me substantially a purchaser, and that which I purchase is completed work.

4. *Suppose I direct A to take charge of my horse, for which I agree to pay a stipulated sum.*

Again I am the creator of a purpose which I intrust to another to execute. And again the duty which A assumes to me is defined by the instructions which I give him. There is also a reciprocal obligation on my part; but it is conditioned, not upon the satisfactory character of the work done, as in the last case, but upon the continuance of the labor; that is to say, so long as A remains in my employ, I am in duty bound to pay the stipulated price, commonly called wages. If I would relieve myself from my obligation, I must terminate the relation. In other words, I am a purchaser, but that which I purchase is A's service, as opposed to his completed labor.



5 Suppose I direct A to execute in my name a deed conveying to B certain lands which I own.

The now familiar elements of the purpose of one and the execution of it by another reappear, together with the determination of the relation between us by the communication of my purpose. As in the last case, what I receive from A is his service; but there is a new factor here, due to the presence of B. Before B accepts such a deed as and for my deed, he is entitled to be certified of the right of A to act in my stead. The relation supposed between A and myself, in other words, must be communicated to B, and until so communicated A cannot effect my purpose. The relation between A and myself is not completely established between us two alone, and is not therefore completely intelligible without the recognition of B's part in it.

These five cases which have just been considered illustrate certain forms of joint action which are very common, and of which many have been gathered under separate titles in the law. In stating them the facts have been reduced to the simplest and barest form, in order to bring out the elements common to the largest number of specific instances; and in analyzing them the common elements of the intention have been stated as briefly as possible.

The first illustration will be readily recognized as typical of the relation classified in the books under the title of trustee and *cestui que trust*, while the fourth and fifth are classified under the titles of master and servant and of principal and agent, respectively. These terms, however, are often misused in the sense that they have been applied to relations of very varying legal import. Thus, A in the first illustration has been called an agent, and in the fifth is very frequently called a trustee.<sup>1</sup> The second and third illustrations have not received specific names; but they illustrate respectively the relation subsisting between a bank and its depositors, and between an owner and a contractor. In all of them it is to be

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<sup>1</sup> In *Rowe v. Rand*, 111 Ind. 206 (1887), a trustee was called an agent. So directors of a corporation are frequently called trustees, their position being in fact much more analogous to, if not indeed identical with, that of an agent as I have used the term. *Cook on Stockholders*, 648, and cases there cited in n. 2. See also *Wilcox & Gibbs Sewing Machine Company v. Ewing*, 141 U. S. 627 (1891), where one who had obtained from the company an exclusive right to sell their machines within a certain territory was called an agent to sell, although he bought the machines outright from the company and then sold them, keeping the purchase price and pocketing the profit or loss himself.

remembered that the classification is based upon a classification of intentions, and is therefore not an organic division, such as that into genera and species, but is rather a mechanical division, such as would be that of books classified according to the number of their pages.

It is of course immaterial what vocable we use to mark these differing relations. It is material, however, that, when once we have made a choice of words, we should thereafter confine the word chosen within the limits of accurate definition. Cases, for example, where there is a transfer of title and a preservation as an entirety of a fund should not be confounded with cases where these play no part. Let me now, therefore, for the sake of accurate discrimination, call attention in more detail to the differences between the last two cases. In the first of the two, that is, the fourth of the supposed cases, the relation between A and myself was dependent solely upon the communications which passed between us two. A became my servant just to the extent to which I gave him directions. In the second of these, that is, in the fifth of the supposed cases, we find that A's agency is inchoate and ineffectual until B has learned of the communications wherein I gave A the right to act in my behalf. It may happen that B is informed of only a part of these communications, nor is it necessary that he should know more of them than will suffice to satisfy him of A's representative character. So much, however, he should know, or else he will refuse to deal with A, and will insist upon direct communication with me, or upon none at all. It follows, therefore, that the intended relation of A to me is not complete in fact, or intelligible in thought, until there are, first, instructions communicated by me to A, and, second, a statement of those instructions made to B. This second element at once distinguishes by a wide gap, the fifth case from the fourth. The latter, being a case where only two persons are necessarily included, is an instance of a bilateral relation, while the former, where three are necessary, is an instance of a trilateral relation.<sup>1</sup>

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<sup>1</sup> Professor Huffcut, in his book, the most recent treatise on agency, very nearly perceived the true nature of these relations. Thus he says: "The fundamental distinction between an agent and a servant lies in the nature of the act which each is authorized to perform. An agent represents the principal in the performance of an act resulting in a contractual obligation, or an obligation springing from contract relations. A servant represents the master in the performance of an act not resulting in contractual obligation." Huffcut on Agency, § 4 (1895).

In his subsequent illustrations in the same section, he distinctly shows that the



Professor Langdell, in a striking passage in his treatise on equity pleading, calls attention to a limitation upon the power of common law courts, as distinguished from courts of equity. He says: —

“They cannot deal with a controversy to which there are more than two parties or two sets of parties. The contract of suretyship will serve as an illustration of this. To such a contract, in its simplest form, there are three parties, viz., the creditor, the principal debtor, and the surety; and no two of them are united either in interest or obligation. No more than two of them, therefore, can be parties to any action at law. If there are several sureties the case is much worse; for though they may all be sued at law by the creditor, if their obligation be joint, yet, in any controversy with the debtor in which they are all interested, the law can afford no remedy; for only one of them can be a party to an action by or against the debtor. In other words, a court of law can only entertain a controversy between the debtor and one surety. So, if a controversy arises between the several sureties, a court of law is equally powerless, as it can only entertain a controversy between two of them.”<sup>1</sup>

This limitation upon the power of common law courts has unfortunately delayed a proper recognition of the complex character of many relations which have come before them for determination. By reason of the presence of only two parties, such relations have been treated as bilateral, and as capable of determination without the presence of other parties, when they have been in fact trilateral, or even multilateral. It is very frequently the case that such a method of treatment is practically possible and, for the sake of convenience, justifiable; but by neglecting the parties not before them the courts have been at times misled as to the true character of the relation with which they were dealing. The famous New York case of *Lawrence v. Fox*,<sup>2</sup> and the controversies which have raged over it, excellently illustrate the difficul-

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agency which he has in mind is one in which three persons are involved as parties, while it is otherwise in his mind with the relations of master and servant. He was misled, however, into a false classification on the basis of the difference between a contract and a tort. It will be readily seen that the source of his error was his failure to understand the relation between the principal and the third party, for all the illustrations of agency which he gives involve three persons. Thus he says: “The law governing the one belongs, therefore, to that branch of the law of obligation having to do with contracts, or torts springing from contracts, as deceit. The law governing the other belongs to that branch of the law of obligation having to do with torts generally.” *Ibid.* His exception of the tort of deceit shows how close he was to the distinction between bilateral and trilateral relations.

<sup>1</sup> Langdell, *Equity Pleading* (2 ed.), § 41.

<sup>2</sup> 20 N. Y. 268 (1869).

ties of which I speak, and yet the matter is strikingly simple. For the purpose of making my point I shall risk a charge of digression in order to analyze that case.

A gave money to B with instructions to pay it to C. In *Lawrence v. Fox* it was held that C could recover from B in an action on contract.<sup>1</sup>

The decision was of course wrong. It assimilated the relation between B and C to the ordinary relation between parties to a simple agreement; whereas the fact was that B had made no promise *to* C, and had received no consideration *from* him. These are the two essential elements of a contract at common law, and both were lacking. On the other hand, B, by accepting the money from A on the conditions prescribed, did create a valid obligation, consensual in its nature and running directly to C. The difficulty is to obtain recognition for it in the courts of common law. They have enforced similar consensual obligations which are not referable to any class of contracts in only two instances that I have been able to call to mind, and those two instances are cases of special actions on the custom of merchants, allowed in deference to an overwhelming commercial necessity. They are actions by the payee of a bill of exchange against the acceptor (an action by the payee of a check against the bank on which it is drawn would be substantially the same thing) and actions against an insurance company by the beneficiary of a policy of insurance other than the one who pays the premiums and takes out the insurance. Courts of equity, however, have had no difficulty in similar cases. Nothing is more common than a bill whereby the beneficiary of a trust, other than the original grantor, endeavors to enforce the trust obligation against the trustee. In these three cases there need be no promise made to the plaintiff or consideration received from him. What a court of equity can do, a court of law, so far as its limited remedial powers will permit, should have no difficulty in doing. It should allow an action by C against B for money had and received, not on the ground of unjust enrichment, but as the common law analogue of a bill against a trustee.

The doubts and obscurities associated with all these cases would have been readily avoided, if their true character had been recognized. They are cases of trilateral relations, in which the obligor

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<sup>1</sup> The point has since been made, that in the actual transaction A was indebted to C. Though that fact is used in New York to limit the scope of *Lawrence v. Fox*, it is not now material and I have consequently neglected it.



has assumed to one of the parties an obligation of which the essence is that he should be under an obligation to the other. In *Lawrence v. Fox*, for example, B, the obligor, made a promise to A, and thereby assumed a duty to A; but the essence of that duty was that he should also be under a duty to C. It follows that, when B refused to perform his promise, he violated two rights at once. A's right should be enforced in any one of three ways, at his election: first, by a bill in equity to compel B to convey the fund to C, which is specific performance, or, as Professor Langdell somewhere more accurately calls it, specific reparation; second, by an action at law for damages for breach of contract, in which, however, the damages will be nominal; third, by an action for money had and received, in which event he would rescind the contract and recover the consideration paid, and this on the ground of unjust enrichment. C, on the other hand, should have either of two remedies, at his election: first, a bill in equity for specific reparation; second, an action for money had and received, which would be based, as I said before, not on the ground of unjust enrichment, but on the consensual obligation, and would be the legal counterpart of his bill in equity. It will be observed that he has no right, or rather power, of rescission. The rights in the case of a bill of exchange, or of an insurance policy, or of a trust, while differing in some details, are nevertheless open to the same general analysis. That these relations are really trilateral is shown by the fact that the obligation assumed by B cannot be released except with the consent of the third person. This is perhaps more evident in the case of a trust than in such a case as *Lawrence v. Fox*.

In the case of agency, the trilateral character of the relation becomes even more important than in these last cases, because the much mooted question of what constitutes an agent's authority will be found to turn on it.

Whatever else we may say about an agent's authority, it is at least coextensive with his ability legally to bind his principal. Now, in the first place, it will hardly be disputed that whatever the principal tells the *agent* he may do, will, when done, be legally valid as the principal's act. Judge Holmes, in an interesting article on agency, says that this is "plain good sense," introducing no new principle into the law and requiring no explanation.<sup>1</sup> In

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<sup>1</sup> 4 Harv. L. Rev. 346, 347.

the second place, it will not be disputed that whatever the principal tells the *third person* his agent may do will, when done, be just as valid an act of the principal as the other. In this last case there may, or may not, be a technical estoppel; but the responsibility of the principal for his agent's acts is, under these circumstances, quite independent of that doctrine. It rests on precisely the same ground as that upon which is founded the doctrine of mutual assent in contracts generally. If an offeree says "Yes" to an offer, he thereby creates a valid legal obligation, and that too without reference to any action by the offeror in reliance upon his assent. It is quite common to call an authority of this kind, based upon representations made by the principal, an "apparent authority." The phrase is unfortunate. It seems to imply some defect of legal validity, when in truth there is none, since the principal is quite as unable to avoid the consequences of acts authorized after this fashion as he is to avoid the consequences of acts authorized in any other.

In every case of dealings with third persons through an agent these two elements will be found: the instructions to the agent, and the representations to the third person; and in hardly any case will these two be precisely identical.<sup>1</sup> It may sometimes suit the principal's purpose to endow the agent with larger powers of action than are made known to the third person. Thus, for example, the principal, when he is a purchaser, will perhaps authorize the agent to offer a higher price than he is willing to make known to the seller. On the other hand, it may sometimes be the case that the principal will inform the third person that the agent may do such and such things, which to the agent he says he may not do. Obviously in this case the principal must abide by his statements to the third person.

An illustration of this difference between the instructions to the

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<sup>1</sup> I use the words "representations" and "instructions" in their largest sense, which includes representation and instruction by conduct as well as by words. It is to be noted in the case of representations that they need not come to the third party directly from the principal. They may come indirectly through the agent. For example, the principal may never see the third person; but if he authorizes the agent to state the scope of the granted powers, he will be bound by such a statement. It not infrequently happens that a statement so authorized may imply a larger power than that contained in the immediate instructions to the agent, in which case the principal will be bound by the statement rather than by the instructions. The principal has in fact empowered his agent to do two things, — to do certain acts, and to make representations as to the authority conferred.



agent and the representations to third persons is presented in a series of cases in which the courts of New York have adopted a rule at variance with the rule of other leading jurisdictions of the common law. A typical case presenting this conflict is that of a shipping agent of a railroad who issues a bill of lading for goods that were not in fact received by the railroad, or of a transfer agent who issues a certificate of stock in a corporation upon a transfer of ownership without taking up the prior certificate, or of the cashier of a bank who certifies a check when there are no funds of the drawer in the bank's possession. The third person in each of these cases is assumed to be an innocent purchaser for value.

In these cases the appointment of the agent to the position of station-master, or of transfer agent, or of cashier, is in itself a representation to all persons having dealings with the corporation through such agents that they are authorized to do all things necessary to the discharge of their official duties. I cannot do better than quote in support of this statement the unanswerable argument of Mr. Justice Davis in the case of *New York, New Haven & Hartford Railroad Company v. Schuyler*<sup>1</sup>:—

“In truth, the power conferred in these cases is of such a nature that the agent cannot do an act appearing to be within its scope and authority without, as a part of the act itself, representing expressly or by necessary implication that the condition exists upon which he has the right to act. Of necessity the principal knows this fact when he confers the power. He knows that the person he authorizes to act for him, on condition of an extrinsic fact, which in its nature must be peculiarly within the knowledge of that person, cannot execute the power without as *res gestæ* making the representation that the fact exists. With this knowledge he trusts him to do the act, and consequently to make the representation, which, if true, is of course binding on the principal. But the doctrine claimed is that he reserves the right to repudiate the act if the representation be false. So he does as between himself and the agent, but not as to an innocent third party who is deceived by it.”

The difficulty of these cases arises from the undetermined elements of custom of which I have before spoken. Positions like these are very common. They carry with them certain broad, well recognized duties and powers, and those who deal with agents in such positions assume the existence of those duties and powers

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<sup>1</sup> 34 N. Y. 30, 70 (1865).

without special inquiry, and both the principal and the person dealing with these agents, and the agents themselves, may be said to incorporate in their transactions these elements of custom. Consequently, to appoint an agent to one of these positions is in fact to hold him out to the world as having certain powers, although their exercise under certain conditions may constitute a breach of the relation between the agent and the principal. The public are, in fact, informed that the agent may make statements as to the existence of the goods named in the bill of lading, or of the stock purporting to be contained in a stock certificate, or as to the amount on deposit to the credit of a drawer; and yet, as between the agent and the corporation in these cases, it is clearly a breach of duty for the agent to make any representation except in strict accordance with the fact. This is a case, therefore, in which the representation to the third person of the agent's authority may exceed in purview the instructions to the agent.

In the case just considered, the New York Court of Appeals has grasped the situation with a finer sense of justice than the courts of some other jurisdictions. It has embodied its rule in such cases in this phraseology, to quote the language of Judge Finch<sup>1</sup>:—

“It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice. . . . A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction it arises in the case of municipal corporations whose structure and functions are sometimes claimed to justify a more restricted liability.”

The New York rule has not been adopted in the other leading jurisdictions.<sup>2</sup> The courts of England, Massachusetts, and the United States Supreme Court have confined themselves to a limited definition of the word “authority,” that is, in effect, they

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<sup>1</sup> *Bank of Batavia v. N. Y. &c. R. R. Co.*, 106 N. Y. 195, 199 (1887).

<sup>2</sup> *Grant v. Norway*, 10 C. B. 665 (1851); *Pollard v. Vinton*, 105 U. S. 7 (1881); *Friedlander v. Texas &c. R. R.*, 130 U. S. 416 (1889); *Mussey v. Eagle Bank*, 9 Met. 306 (1845).



define it as the instructions by the principal to the agent, neglecting the fact that the principal may put it out of his power to have recourse to these by reason of his representations to others. If the views herein contended for are correct, it will be seen that the New York rule, while not strictly accurate in its expression, conforms nevertheless more truly than the other to the trilateral character of the relation, and is therefore more consonant with justice.

It is often said that the law of agency depends upon a fiction. Judge Holmes, in the article to which I have previously referred,<sup>1</sup> endeavors at great length to establish this proposition. His difficulty is this: while he admits the "plain good sense" of holding the principal responsible for "commanded acts," by which it is clear that he means acts dependent upon direct instructions of the principal to the agent, he cannot understand a responsibility for acts not so commanded. He therefore relegates all such responsibility to a fiction of "identity" between the principal and agent, for which he strives to account historically as a survival of the old doctrines as to the *patria potestas*, and the merging of individual identity in that of the *familia*. So far as it works practical justice, he would retain this fiction; but he conceives that it has been carried to excessive lengths in actual decision.

His theory is open to several criticisms. In the first place, it is quite doubtful whether he has successfully established any connection between the doctrines as to *patria potestas* and our common law. The former are natives of Rome, and it may be questioned whether they were ever domiciled in England. His argument on that point is far from convincing. In the second place, it is the veriest abdication of our reason to base a rule of law on a fiction, trusting it to work practical justice, and to stop there. His obvious duty was to ascertain a theory and standard of practical justice, and then discard the fiction. Without such an extrinsic standard what limit can he put on its operation? In the third place, and this is the fundamental criticism, he fails to recognize that the principal by his representations to others may render himself accountable to them for acts not commanded, or even for acts which, as between himself and his agent, he has forbidden. Such a liability is as plain good sense as that for commanded acts, and will explain many of

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<sup>1</sup> 4 Harv. L. Rev. 345, continued in 5 *ibid.* 1. See also an article, "Why is a Master liable for the Tort of his Servant?" by Frank W. Hackett, 7 Harv. L. Rev. 107.

the cases for which the learned writer failed to find an intelligible theory. Judge Holmes seems to have been also confused by cases of adjudicated liability not properly falling within the categories either of commanded acts or of acts represented to be commanded. These cases, however, are justifiable on no theory at all. They rest, not upon fiction, but upon injustice and departure from the real relations, and no explanation of them is required, or even possible.

I hold the fact to be that whenever a man conceives a purpose and procures its accomplishment ostensibly as his act, whether by machine or by another individuality, the act so done is his act in every legitimate and truthful sense, and that a resort to a fiction to sustain a legal responsibility for it is quite unnecessary.

In conclusion, it is to be added that one great object of this article will be effected, if I have made clear, in addition to some difficulties of my strict subject matter, the fact that legal relations may be extremely complicated, that they cannot be successfully handled without taking into view all the persons between whom the relations subsist and all the relations subsisting between those persons, and that just as there are bilateral relations, so there may be trilateral, quadrilateral, or even multilateral, relations. As the restrictions of ancient procedure are swept away, we should find less difficulty in dealing with these complications, and a more systematic understanding of them than has ever existed in the past should be the portion of the future.

*Everett V. Abbot.*

NEW YORK, February 4, 1896.



## INJUNCTIONS AGAINST LIQUOR NUISANCES.

CAN a court of equity constitutionally enjoin, as a public nuisance, the use of premises for the illegal sale of intoxicating liquors, without proof that the sale amounts to a nuisance to property?

Most lawyers would, I think, be inclined to answer the question in the negative were it not for the fact that in a number of cases, some of which have apparently been well contested, statutes giving such a power have been upheld, both under the Federal and State Constitutions.<sup>1</sup> In no case, I believe, has such legislation been held unconstitutional, though it has already been adopted and is, apparently, actively and most effectively enforced in no less than seven of the States.<sup>2</sup> The novelty of such a method of enforcing an excise or prohibitory law alone invites a scrutiny of its validity. And the importance of the inquiry is emphasized by the fact that similar provisions, empowering courts of equity to restrain violations of statutory prohibitions against monopolies, trusts, etc., have recently been incorporated in the Interstate Commerce Act,<sup>3</sup> the Anti Trust Act,<sup>4</sup> and the Tariff Act of 1894.<sup>5</sup>

Of the statutes we are now considering, that of Massachusetts may fairly be taken as a type. It is as follows: —

<sup>1</sup> *Schmidt v. Cobb*, 119 U. S. 286; *Kansas v. Ziebold*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Eilenbecker v. District Court of Plymouth Co.*, 134 U. S. 31; *Carleton v. Rugg*, 149 Mass. 550; *Littleton v. Fritz*, 65 Ia. 488; *State v. Crawford*, 28 Kan. 726, *semble*; *State v. Currier*, 19 Atl. Rep. (N. H.) 1000, *semble*; *State v. Fraser*, 48 N. W. Rep. (N. D.) 343, *semble*.

<sup>2</sup> Mass., Pub. St. c. 380, § 1; N. H., Pub. St. c. 205, §§ 4, 5; Vt., Rev. St. § 3834; Ohio, 2 Rev. St. § 6942; W. Va., Code, c. 32, § 18; Ia., McClain's Code, § 2384; Kan., Comp. L. § 2533; N. D., L. 1890, c. 119, § 13; S. D., L. 1890, c. 101, § 13.

<sup>3</sup> U. S. Stat. 1889, c. 382, §§ 1, 5.

<sup>4</sup> U. S. Stat. 1890, c. 647, § 4.

<sup>5</sup> U. S. Stat. 1894, c. 349, § 74. The Tariff Act, after prohibiting combinations, etc. in restraint of trade, provides, by section 74, "that the several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several District Attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations."

"The Supreme Judicial Court and Superior Court shall have jurisdiction in equity upon information filed by the District Attorney for the district, or upon the petition of not less than ten legal voters of any town or city, setting forth the fact that any building, place, or tenement therein is resorted to for prostitution, lewdness, or illegal gaming, or is used for the illegal keeping or sale of intoxicating liquors, to restrain, enjoin, or abate the same as a common nuisance, and an injunction for such purpose may be issued by any justice of either of said courts.

The statutes of some of the other States are quite different in details, often, and particularly in the case of North and South Dakota, strongly suggesting the real criminal nature of the law.<sup>1</sup> But the principal involved in all is the same.

In the two cases in which the constitutionality of the statutes under the State Constitutions has been most discussed,<sup>2</sup> they have been sustained on the ground that, while equity cannot enjoin a crime as such, it has always had jurisdiction to restrain nuisances and to regulate the use of property, and that, as the legislature can declare what acts shall constitute a nuisance, it may also declare that the remedies which equity has used against other nuisances may also be employed to restrain such statutory nuisances.

It seems clear that, apart from the statutes, equity would not exercise the jurisdiction which they confer. The act prohibited is in itself nothing but a crime of a very familiar kind, and that equity cannot enjoin a crime as such none will dispute. Nor does it help matters that the illegal act is, or is called, a nuisance. Over nuisances as such, and as they are defined in the

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<sup>1</sup> Thus in North Dakota the Attorney General, his assistant, or any citizen of the county, may maintain an action in the name of the State to abate and enjoin the use of premises for the illegal sale, etc. of intoxicating liquors. The injunction is to be granted at the beginning of the action, and may be upon an affidavit and complaint made on information and belief, and without a bond. Upon affidavits showing that intoxicating liquors are illegally sold or kept for sale on the premises, the court or judge must issue a warrant under which an officer must search the premises, invoice all articles found, used in carrying on the unlawful business, seize and hold to abide the event of the action all intoxicating liquors, and seize and hold possession of the premises until final judgment. In proceedings to punish for a contempt, the accused may plead as he would to an indictment, may be required to answer interrogatories, oral or written, and in case of conviction must be punished by a fine of not less than \$200 nor more than \$1,000, and by imprisonment for not less than ninety days nor more than one year, the same penalties imposed by the statute for the illegal sale itself. N. D. L., 1890, c. 110, § 13.

<sup>2</sup> *Carleton v. Rugg*, 149 Mass. 550; *Littleton v. Fritz*, 65 Ia. 488.



criminal law, equity has never assumed jurisdiction. "It seems," says Hawkins,<sup>1</sup> "that a common nuisance may be defined to be an offence against the publick, either by doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires." And he cites as familiar instances, common bawdy-houses, stages for rope-dancers, gaming-houses, a common scold, etc. An injunction against a scold would indeed be a novelty.

The jurisdiction of equity over a certain class of public nuisances is, however, well settled, and proceeds upon clearly defined grounds. It is not, so far as reported cases go, of very ancient origin. In 1752,<sup>2</sup> Lord Hardwick refused to enjoin the building of a smallpox hospital, and intimated that, if it were a public nuisance, the remedy was by a criminal information by the Attorney General, referring to an unreported case of the stopping of a way behind the Exchange in the city, when Lord King had recommended the Attorney General to prefer an information in the King's Bench. In 1799,<sup>3</sup> Lord Loughborough enjoined the putting of sugar in houses which would be rendered liable to fall thereby, but the case is poorly reported, and the ground for the decision not clear. In 1811,<sup>4</sup> the jurisdiction was questioned by counsel, and Lord Eldon was unable to find any precedents other than the injunction granted by Lord Loughborough. He refused to grant a preliminary injunction against the maintenance of a soap factory. In 1816,<sup>5</sup> upon an application in a suit to which the Attorney General was not a party, for an injunction against the use of a building as a powder mill, Sir Samuel Romilly, counsel for the plaintiffs, admitted that injury to property, not danger to life, was the only ground upon which equity could interfere, and upon this ground Lord Eldon granted a preliminary injunction.

An earlier case, *Attorney General v. Richards*,<sup>6</sup> decided in 1794, involved questions both of purpresture and nuisance, and is the first reported case of an injunction against a nuisance to the public right of navigation. The suit was by information in the Court of Exchequer to restrain the erection of wharves between high and

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<sup>1</sup> 2 Pleas of the Crown, Bk. I. c. 75, § 1.

<sup>2</sup> *Baines v. Baker*, 1 Ambl. 158; s. c. 3 Atk. 750.

<sup>3</sup> *Mayor of London v. Bolt*, 5 Ves. Jr. 129.

<sup>4</sup> *Attorney General v. Cleaver*, 18 Ves. Jr. 211.

<sup>5</sup> *Crowder v. Tinkler*, 19 Ves. Jr. 617.

<sup>6</sup> 2 Anstr. 603.

low water mark, and for the abatement of those already erected. It was alleged and argued that the erections were both a purpresture and a nuisance, the former as an encoachment upon the King's *jus privatum* to the soil between high and low water mark, and the latter as an interference with the *jus publicum* of free navigation.<sup>1</sup> It was conceded that, regarding the wharves as purprestures, the defendants could justify under a royal grant of the soil, but not if they were a nuisance. The *jus publicum*, though vested in the Crown, is inalienable, and held solely for the benefit of the public, for whom the King is bound to preserve it unimpaired.<sup>2</sup> But the jurisdiction of the court to enjoin or abate the structure as a nuisance was vigorously disputed. *Piggott & Richards*, for the defendants, say, at page 613:—

“As to the question of nuisance, that is a matter completely foreign to the jurisdiction of a court of equity. It is a breach of the general police of the kingdom, and as such is considered as a crime, and to be prosecuted in the criminal courts. But a court of equity cannot hold cognizance of any criminal matter. It never was attempted to prosecute a suite in equity to remedy any other public mischiefs, as to prohibit rope-dancing, plays, etc., or to abate a nuisance or purpresture on the highway. That is exactly like the present case, and is every day prosecuted in the ordinary criminal courts. Questions of nuisance are particularly improper to be discussed in equity, because the remedy at law is complete.”

The court granted a decree abating the structure ostensibly as a purpresture, but as no inquiry was had to determine whether it were not more profitable for the King to have it remain subject to a rent, the decision can be better supported upon the theory of nuisance. In a similar case in 1819,<sup>3</sup> an application was made to restrain the erection of an embankment as a nuisance to the public rights in the Thames. Lord Eldon did not doubt his jurisdiction, and granted a temporary injunction pending the trial of an indictment.

In 1853, in *Attorney General v. The Sheffield Gas Consumers' Company*,<sup>4</sup> the Court of Appeal held that the tearing up of the pavements in a town for the purpose of laying gas-pipes, though

<sup>1</sup> For a discussion of these two rights, see Hale, *De Jure Maris*, p. 12; *De Portibus Maris*, pp. 81, 83, 88, 89.

<sup>2</sup> Compare, Hale, *De Portibus Maris*, p. 87.

<sup>3</sup> *Attorney General v. Johnson*, 2 Wils. Ch. 87.

<sup>4</sup> 3 DeG. M. & G. 304.



unauthorized, and therefore a nuisance, should not be enjoined, as the injury resulting to the public would be but slight. Upon this question of fact Lord Justice Knight Bruce dissented, and the correctness of the decision on this point may perhaps be questioned. Lord Justice Turner's statement of the principle underlying the jurisdiction of the court in such cases is, however, important. He says, at page 320: —

“I confess, however, that, looking at the principles on which as I apprehend this court interferes, it does not appear to me that there can be any sound distinction between cases of private and public nuisance. It is not on the ground of any criminal offence committed, or for the purpose of giving a better remedy in the case of a criminal offence, that this court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this court must rest; and taking it to rest upon that ground, the only distinction which seems to me to exist between cases of public and private nuisance is this, that in cases of private nuisance the injury is to individual property, and in cases of public nuisance the injury is to the property of mankind.”<sup>1</sup>

The decision was followed in 1868 by the Court of Appeal in *Attorney General v. Cambridge Consumers' Gas Co.*,<sup>2</sup> where Lord Justice Selwyn, referring to the position of the Attorney General, said, at page 86: —

“He sues, as representing the public, by an original independent title, namely, as protector of the rights of the public against a nuisance to the public highway.”

It seems then to be sufficiently evident that in the cases of public nuisances there is no exception to the general rule that equity has jurisdiction only in civil cases, and that its injunctions will issue only to prevent or remedy injuries of a civil nature to property. The general rule was much discussed and authoritatively stated in 1861, in the interesting and important case of *Emperor of Austria v. Day*.<sup>3</sup> There an injunction restraining the defendant Day from making notes purporting to be notes of the Hungarian state, or from delivering them to the defendant Kossuth, who intended to use them in Hungary, was sustained, on the ground that the plaintiff, as King of Hungary and representing the Hungarian people,

<sup>1</sup> Compare *Saltau v. De Held*, 2 Sim. N. S. 133, 154; *Kavanagh v. Barber*, 131 N. Y. 211.

<sup>2</sup> L. R. 4 Ch. App. 71, reversing s. c., L. R. 6 Eq. 282.

<sup>3</sup> 3 DeG. F. & J. 217.

had the right in Hungary of issuing money, and that this was a civil right having a pecuniary value, and therefore a property right, which equity should protect. *Roundell Palmer, Cairns, & Cotton*, for the plaintiff, sought to support the jurisdiction only upon this ground. They say, at page 225:—

“All that is necessary to found the jurisdiction of this court is that there should be a direct clear interference with a right clearly connected with property. Cases on the revenue laws have no bearing; there is no doubt that no state takes notice of the revenue laws of another. The issue of these notes would be politically mischievous, and that is one great reason, no doubt, why the plaintiff wishes to restrain it; but we do not ask for the injunction on political grounds, but on the ground that the issue is an interference with a right of property of the plaintiff, and will inflict pecuniary injury on his subjects by bringing a quantity of spurious paper money into circulation.”

And this was the view of the court. Thus Lord Campbell says, at page 240:—

“I consider that this court has jurisdiction by injunction to protect property from an act threatened, which if completed would give a right of action.”

To the same effect Lord Justice Turner, at page 253, says:—

“I agree that the jurisdiction of this court in a case of this nature rests upon injury to property actual or prospective, and that this court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property, but I think there are here rights of property quite sufficient to found jurisdiction in this court.”

And in *In re Debs*,<sup>1</sup> the Supreme Court sustained the injunction issued at the time of the Chicago strike, in 1894, against interferences with interstate commerce, on the ground that the United States has an interest in the highways of interstate commerce, or is subject to an obligation toward the public regarding them, which entitles it to sue in equity to restrain unlawful obstructions. They say, at page 593:—

“A chancellor has no criminal jurisdiction. Something more than the threatened commission of an offence against the laws of the land is necessary to call into exercise the injunctive power of the court. There

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<sup>1</sup> 158 U. S. 564.



must be some interferences actual or threatened with property or rights of a pecuniary nature, but when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves violations of the criminal law."<sup>1</sup>

Now it may perhaps be said that the maintenance of an illegal saloon, or a gambling, or other disorderly house, is not only a nuisance in the sense in which that word is used in the criminal law, but often works a very substantial injury to property rights. This is quite true, and upon proof of the injury it has been held that an adjoining owner is entitled to an injunction against the maintenance of a house of ill fame.<sup>2</sup>

Conversely, in default of proof of such injury the court has refused to enjoin the illegal sale of liquor,<sup>3</sup> or the illegal running of street cars on Sunday.<sup>4</sup>

It may well be, moreover, that a house in which liquors are illegally sold, or which is rendered disorderly by other unlawful acts, is of such a character as to affect the public in their use of the adjoining highway, or in their enjoyment of other public property rights. In such case an injunction might well be granted, though an indictment would usually afford an adequate remedy. But it is equally true that often the illegal sale of liquors or gambling may be so conducted as to work no perceptible injury to any such public right. Suppose, for example, that a hotel conducted in an entirely orderly manner serves wine to its guests at table. Is the Attorney General entitled to an injunction? In the absence of a statute, clearly not. Can he be given the right by statute?

We may, I think, concede that such legislation would not fall

<sup>1</sup> See also Attorney General *v.* Utica Fire Ins. Co., 2 Johns. Ch. 371, 378; *In re* Sawyer, 124 U. S. 200, 210; Attorney General *v.* Tudor Ice Co., 104 Mass. 239, 240. The right of the Attorney General, as representing the *parens patriæ*, to restrain the commission by corporations or public bodies of *ultra vires* or illegal acts tending to the public injury, seems to rest upon special grounds. Such cases are concededly exceptional. See Attorney General *v.* Oxford & C. Ry. Co., 2 W. R. 330, 331; Attorney General *v.* Cockermouth Local Board; L. R. 18 Eq. 172; Attorney General *v.* Great Eastern Ry. Co., 11 Ch. D. 449; Attorney General *v.* Shrewsbury Bridge Co., 21 Ch. D. 752; *People v.* Ballard, 134 N. Y. 269; Attorney General *v.* Tudor Ice Co., 104 Mass. 239.

<sup>2</sup> *Cranford v.* Tyrrell, 128 N. Y. 341; *Hamilton v.* Whitridge, 11 Md. 128. Cf. *Anderson v.* Doty, 37 Hun, 160, *contra*.

<sup>3</sup> *State v.* Uhrig, 14 Mo. App. 413; *Campbell v.* Scholfield, 3 Pittsb. (Pa.) 443; *Oglesby Coal Co. v.* Pasco, 79 Ill. 164, *semble*. Compare *State v.* Crawford, 28 Kan. 726.

<sup>4</sup> *Sparhawk v.* Union Passenger Ry. Co., 54 Pa. St. 401.

within any of the prohibitions of the Federal Constitution. No question can of course arise except under the Fourteenth Amendment, as the first ten Amendments impose no restrictions on the State legislatures. And "due process of law," as used in the Fourteenth Amendment, does not require that modes of trial in all the States shall be the same, or that in any particular State they shall remain the same. A right to a jury trial in a particular case may be given in one State, and not in another; and such a right may be abolished without violating the prohibitions of that Amendment.<sup>1</sup> So far as judicial proceedings are concerned, its provisions seem to secure merely the right to a fair trial in a court of justice according to the modes of proceeding which under the laws of the State then in force are applicable.<sup>2</sup> That there was no violation of the right to such a trial by the liquor nuisance statutes we are discussing seems to have been the only point decided in *Schmidt v. Cobb*,<sup>3</sup> *Kansas v. Ziebold*,<sup>4</sup> *Kidd v. Pearson*,<sup>5</sup> and *Eilenbecker v. District Court of Plymouth County*.<sup>6</sup> Upon what seems to be the settled construction of "due process of law," as used in the Fourteenth Amendment, these decisions are very likely correct.

But the question arising under the State Constitutions is quite different. These were adopted not as a restraint upon many States with diverse systems of procedure, but with reference to but one jurisdiction, in which presumably the main features of practice both in criminal and in civil proceedings were well settled. "Due process of law," or the "law of the land," as here used, may, therefore, well be given a more restricted meaning, preserving the right to a jury trial in cases in which it was well established. In the words of Chief Justice Shaw, —

"These terms, in this connection, cannot, we think, be used in their most bald and literal sense to mean the law of the land at the time of the trial; because the laws may be shaped and altered by the legislature, from time to time; and such a provision intended to prohibit the making of any law impairing the ancient rights and liberties of the subject would under such a construction be wholly nugatory and void. The legislature

<sup>1</sup> *Walker v. Sauvinet*, 92 U. S. 90; *Missouri v. Lewis*, 101 U. S. 22, 31, *semble*; *Hallinger v. Davis*, 146 U. S. 314. See also *Hurtado v. California*, 110 U. S. 516, 534.

<sup>2</sup> *Davidson v. New Orleans*, 96 U. S. 97; *Hurtado v. California*, 110 U. S. 516; *Hallinger v. Davis*, 146 U. S. 314.

<sup>3</sup> 119 U. S. 286.

<sup>5</sup> 128 U. S. 1.

<sup>4</sup> 123 U. S. 623.

<sup>6</sup> 134 U. S. 31.



might simply change the law by statute, and thus remove the landmark and barrier intended to be set up in this provision in the Bill of Rights. It must therefore have intended the ancient established law and course of legal proceedings by an adherence to which our ancestors in England before the settlement of this country and the emigrants themselves and their descendants had found safety for their personal rights."<sup>1</sup>

The State Constitutions, moreover, generally provide expressly that the right to a jury trial, both in criminal and civil cases, shall remain inviolate.<sup>2</sup> In Massachusetts the right to such a trial upon a criminal prosecution for a minor offence, such as a violation of an excise law, is not expressly provided for. But as a part of the "law of the land" it seems to be guaranteed, if "law of the land" is to be construed as it was by Chief Justice Shaw in *Jones v. Robbins*, *supra*. For as early as 1692, at least, penalties of fine and imprisonment were prescribed for the illegal selling of liquors. These penalties might be enforced by a justice of the peace.<sup>3</sup> But apparently ever since 1699 there has been a provision for an appeal from his decision to some court in which the accused would be entitled to a jury trial.<sup>4</sup> Furthermore, as the liquor nuisance statutes purport to provide for a civil proceeding, the various constitutional provisions regarding jury trials in civil suits seem to be applicable.

We have then certain acts condemned by the criminal law, for the punishment of which at the time of the adoption of the State Constitutions there was, in most of the States at least, a well set-

<sup>1</sup> *Jones v. Robbins*, 8 Gray, 329, 342.

<sup>2</sup> Mass. Const., Part First: "Art. XII. . . . And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land."

"Art. XV. In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

Ia. Const. Art. I, sec. 9. "The right of trial by jury shall remain inviolate," etc. . . . Sec. 10: "In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury."

See also N. H. Bill of Rights, Arts. 15, 20; Vt. Const., Ch. I. Arts. X., XII.; Ohio Const., Art. I. secs. 5, 10; W. Va. Const., Art. III. secs. 10, 13, 14; Kan. Bill of Rights, secs. 5, 10; N. D. Const., Art. I. secs. 7, 13; S. D. Const., Art. VI. secs. 2, 6.

<sup>3</sup> Acts and Resolves of the Province of Massachusetts Bay, Vol. I. p. 56, ch. 20.

<sup>4</sup> *Ibid.*, p. 368, ch. I; R. St. c. 85, § 28; Gen. St. 173, § 1; P. St. c. 155, § 58.

tled system of procedure under which the accused was entitled to a jury trial. Of such acts equity had never taken jurisdiction. The Constitution adopted provided that the right to a jury trial in both criminal and civil cases should remain as then existing. Can equity subsequently be given statutory power to enjoin the acts, and, without the intervention of a jury, punish as a contempt a violation of its injunction?

It is probably true that the constitutional provisions cited do not prevent all statutory enlargement of equitable jurisdiction. The Constitutions are instruments of government, in the construction of which many things must be taken into account. When they were first adopted the States were comparatively young, and the society for which they were framed much less complex than now. Many questions of judicial procedure, and of substantive equitable and legal rights, which had not then arisen, have since become of importance, and other like questions will arise in the future. These questions the courts or the legislatures have been, and will be, called upon to settle. We should take quite too narrow a view to hold that in no case can equity take or be given a jurisdiction which the colonial or territorial courts had not asserted. The guaranties of "due process of law" and of "jury trial" had reference not merely to the incomplete and undeveloped systems of law which the local courts and legislatures had so far found sufficient for their needs, but to the whole body of law and system of procedure which the colonists brought from England, and which ever since have formed the basis of the judicial systems of the States. That at the time of the adoption of a particular constitution the courts or legislature had neglected or refused to extend the jurisdiction of equity to all cases to which it had been extended in England, does not necessarily prevent such extension in the future. Nor need the jurisdiction always be as limited as it may have seemed to be in England at the time of the Revolution. That equity had refused to act in certain cases of the same general class as those with which it commonly dealt, was often largely accidental. Such self-imposed limitations might be removed by a later and more enlightened chancellor, or might be abrogated by statute, without any real change in the nature of the jurisdiction. If the court of its own motion or prompted by statute moulds its jurisdiction to a developing civilization by taking cognizance of and extending its protection to new rights analogous to those which it has before protected, it cannot be charged with usurpation of powers. Nor



should a statute authorizing or directing such an enlargement of jurisdiction be held invalid. It was the system of equity as a whole, considered broadly with a view to its main fundamental principles, and with all its possibilities of legitimate development and growth in accordance with those principles, which was a part of the "law of the land" contemplated by the Constitutions.

But it by no means follows that equity can, with or without a statute, extend its jurisdiction without limit. Chancery is a civil, not a criminal court; a court for the protection of civil rights of property, using the term broadly, not for the prevention of assaults to the person, or for the enforcement of the police regulations of the State. These distinctions have always been fundamental. The chancellor cannot constitutionally enjoin the commission of a crime as such, without reference to its effect upon property rights, as a judge at circuit cannot constitutionally try a prisoner for murder without a jury. And statutes authorizing either would be equally invalid.

In Massachusetts itself, in ordinary civil proceedings, it is settled that the court in exercising an equitable jurisdiction given it by statute must preserve the right to a jury trial as to all issues previously so triable by the course of the common law. Thus in a statutory creditor's suit brought before judgment recovered at law, the defendant was held entitled to the verdict of a jury upon the issue of his indebtedness to the plaintiff. Field, J., says:—

"It is plain that the question whether the Raymonds are indebted to the plaintiff for goods sold and delivered is a controversy concerning property, which, when the Constitution was adopted, had been always tried by a jury in Massachusetts since the Province Charter, had been usually so tried before that charter, and had been so tried in England; that it is not a case in which a trial otherwise than by jury had theretofore been used and practised, or a case in its essential features unknown to the jurisprudence of the Province and the State at that time. The remedy which the plaintiff seeks is substantially the common law remedy. He seeks to establish his debt against the Raymonds, and to have it paid out of their property, which he alleges they have conveyed to Salmon by a conveyance which is fraudulent and void as to him. The rights sought to be determined and enforced are essentially legal, as distinguished from equitable rights. The statute has changed the mode of procedure, but it would be trifling with the Constitution to hold that, by changing the forms of procedure, the substantial rights declared by it can be taken away. In all controversies which are within the purview of that article of the Declaration of Rights, the 'method of procedure' of a trial by

jury must be held sacred, whatever the other forms of procedure may be."<sup>1</sup>

The same principle was stated with reference to statutory extensions of the jurisdiction of courts of admiralty in *United States v. One Hundred and Thirty Barrels of Whiskey*,<sup>2</sup> as follows:—

"And it is too clear to admit of doubt that, if these are cases *at common law*, they are within this clause of the Constitution, and the parties are entitled to a trial by jury. It is equally clear that Congress has no power under the Constitution to deprive a suitor of this right, by declaring that a case not properly within the jurisdiction of the admiralty shall be treated and dealt with according to the known principles of courts of admiralty."<sup>3</sup>

The same principle was by implication at least approved in *United States v. Debs*.<sup>4</sup> Judge Woods, in sustaining the validity of the fourth section of the Anti Trust Act of 1890,<sup>5</sup> authorizing injunctions against violations of the act, held that the case was one of equitable character, and that within the proper subjects of equitable cognizance, as established when the Constitution was adopted, it was competent for Congress to vest the court with the equitable power granted. And the Supreme Court in sustaining the jurisdiction of the court preferred to rest its decision on the ground that apart from the statute equity could at the suit of the government enjoin an interference with the highways of interstate commerce.<sup>6</sup>

As has already been suggested upon the facts of a particular

<sup>1</sup> *Powers v. Raymond*, 137 Mass. 483, 485. See also *North Pennsylvania Coal Co. v. Snowden*, 42 Pa. St. 488; *Haines's Appeal*, 73 Pa. St. 169, 171.

<sup>2</sup> 1 Bond, 587, 588.

<sup>3</sup> Compare *City of Janesville v. Carpenter*, 77 Wis. 288, where a statute prohibiting the driving of piles or building of pier, etc. in a certain river provided that "the doing of any such act should [shall] be enjoined at the suit of any resident taxpayer without proof that any injury or danger has been or will be caused by such act." No question of rights to navigation being involved, the court held the statute unconstitutional, and refused to enjoin such erections by the owner of the soil. They say, at p. 299: "The legislature would have saved time and expense if it had issued the injunction in the case for which the act was made. This is the first time that any legislature of any enlightened country ever attempted to create an action without any *cause* of action, to authorize a complaint to be made to a court where there is nothing to complain of; to compel the courts to enjoin the lawful use and enjoyment of our own property 'without proof that any injury or danger has been or will be caused by reason of such act'; . . . or to adjudicate and decide the case, and then order and compel the court to execute its judgment by issuing an injunction."

<sup>4</sup> 64 Fed. R. 724, 753.

<sup>5</sup> 26 U. S. Stat. 209.

<sup>6</sup> *In re Debs*, 158 U. S. 564.

case, a liquor nuisance might work such an injury to either public or private property rights that it could be enjoined without statutory authority. And if the court refused to act because of the slight nature of the injury, it might perhaps constitutionally be authorized and directed to do so if some injury in fact existed. But there need be no injury at all, and the liquor nuisance statutes neither require nor contemplate proof of any such injury, actual or threatened. They are obviously not aimed at the protection of property, but at the prevention of crime, and by a method which, it seems, cannot constitutionally be employed.

The decisions sustaining the acts seem to have failed to draw the distinction between a use of property causing an injury to property which can be enjoined, and a use which is merely illegal, but so far as civil remedies are concerned works no injury and can afford no cause of action of a civil nature. They seem also not to discriminate between the public nuisance of the criminal law, which may consist of the doing of any illegal act which the statute declares to be a nuisance, and the public nuisance to property of which alone equity has taken or can take jurisdiction.

*Arthur C. Rounds.*



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HON. CHARLES DOE, Chief Justice of the Supreme Court of New Hampshire, who died suddenly on March 9, 1896, was a valued contributor to this REVIEW, being the author of "A New View of the Dartmouth College Case," 6 HARVARD LAW REVIEW, 161-181 and 213-222; and "Lease of Railroad by Majority of Stockholders with Assent of Legislature," 8 HARVARD LAW REVIEW, 295-316 and 396-414.

His official tenure was almost unique. Appointed to the Supreme Bench in 1859 at the early age of twenty-nine, he continued there, with the exception of two years (1874-1876), until his death at the age of sixty-five; thus passing more than half his life in the discharge of judicial duties. Judge Doe's reported decisions have given him a deservedly high reputation outside the limits of New Hampshire, and some of them have seldom been surpassed. But his extraordinary ability was fully known only to those who came in personal contact with him as practitioners or associates. The rapidity with which his mind worked was simply marvellous, vividly recalling the descriptions given of the late Master of the Rolls, Sir George Jessel. The moment a case was stated, he could generally discern at once the vital issue; and was usually able, as soon as the case was submitted, immediately to express an opinion in short, crisp sentences, which not only completely disposed of the matter in hand, but caused everybody to wonder how there could ever have been any doubt about the result. In keenness of analysis and in the faculty of terse and vigorous expression he combined qualities of the highest order, which are not often found united in one person. A few of his written opinions may be open to the objection of over-elaboration. But there was never any obscurity or prolixity in his oral utterances, and a large proportion of his reported decisions are models of condensation and clearness.

In a humorous sketch read by a bright young lawyer before a Bar Association, Doe, C. J., is represented as rendering a certain decision and giving as the sole reason "that the law has hitherto always been under-

stood to be otherwise." This was, of course, a playful exaggeration; but it is true that the novelty of a proposition did not furnish to his mind a *prima facie* presumption against its adoption. He not unfrequently advanced theories which, at the time, struck the profession as heretical. But not a few of these heresies ultimately came to be regarded as "orthodoxies." In more than one instance where he originally stood alone as a dissenter, the entire Court subsequently adopted his views. From the multitude of his opinions it is difficult to select any single one which will give an adequate idea of his power. Some of his most forcible sentences are to be found in that part of the dissenting opinion in *Boardman v. Woodman*, 47 N. H. 120 (see especially pp. 148 and 150), where he combats the prevailing theory that delusion is the legal test of insanity. His strong sense of humor crops out in the opinion in *De Lancey v. Ins. Co.*, 52 N. H. pp. 587 to 591. A few years ago, when the arguments and influence of the insurance companies seemed certain to defeat a bill pending in the Massachusetts Legislature, a member rose, with "Fifty-second New Hampshire" in his hand, and said that he should like to read to his colleagues the opinion expressed by the Supreme Court of New Hampshire relative to insurance companies. Before the reading had progressed far the House was convulsed with laughter, and there was no effective opposition to the passage of the bill.

During Judge Doe's long term of service, a great revolution took place in the legal procedure of the State; a change which was due to him more than to any other one man (although great credit must also be given to his colleague, the late Chief Justice Bell, who drew up the admirable "Rules for Regulating the Practice in Chancery," 38 N. H. 605-624). Instead of waiting for the legislature to enact a poorly drawn code, the New Hampshire Court proceeded to simplify practice by their decisions; not merely by discouraging formal objections, but by boldly declaring that "parties are entitled to the most just and convenient procedure that can be invented," and by distinctly recognizing "the judicial duty of allowing a convenient procedure as a necessary instrument of the administration of the law of rights." (See the very able opinions in *Metcalf v. Gilmore*, 59 N. H. pp. 431 to 435; and in *Owen v. Weston*, 63 N. H. pp. 600 to 605.) The result is a flexibility of remedies in New Hampshire not surpassed by any of the so-called "Code States." But more than all this was the general tone imparted to legal proceedings by Judge Doe's strong personality. Until his memory is forgotten, cases in New Hampshire will be tried expeditiously and upon their merits; justice will not be "strangled in the net of form"; and witnesses will not be subjected to insulting and abusive treatment at the hands of cross-examiners. His mode of living and all his habits were democratic and simple in the extreme; and his love of simplicity led him, when presiding alone at *nisi prius*, to go far towards abolishing the mere forms and ceremonies which are usually observed in the court-room. But there was no omission of any incident of procedure which was really essential to the rights of suitors.

Socially, Judge Doe was one of the most delightful of men. He did not reserve himself for great occasions, but always abounded in good sayings. Few persons have ever spent an hour in his company without carrying away something to remember him by. His intimate friends of many years are now like men "from whose day the light has departed."

J. S.



THE GETTYSBURG RESERVATION. — In one of his first opinions at Washington Mr. Justice Peckham has had an opportunity of showing how he deals with cases which call for a decision as to the constitutionality of a statute. At the present day when there seems to be a tendency to forget that the courts have only a limited power in dealing with acts of the legislature, it is a matter of some significance that the latest member of the Supreme Court should assume a conservative, discriminating attitude, and should declare, as did the earliest interpreters of the Constitution, that the court should interfere only in a clear case. The duty and the discretion of making laws has been intrusted to the legislature, and an act, said Mr. Justice Peckham, "is presumed to be valid unless its invalidity is plain and apparent. No presumption of invalidity can be indulged in. It must be shown clearly and unmistakably." (*United States v. Gettysburg Electric Ry. Co.*, 16 Sup. Ct. Rep. 427.)

The question before the court concerned the constitutionality of an Act of Congress providing for the condemnation of portions of the battlefield at Gettysburg and for the erection of tablets to mark the lines of the battle "with reference to the study and correct understanding of the battle." It was objected that there was no clause in the Constitution which gave Congress the right to condemn land for such a purpose, but the court decided that express authority was not necessary. "The power," it was said, "to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of these powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred." While the result is acceptable, it would seem that the court might have avoided this somewhat unfortunate appearance of making something out of a sum of nothings; the case, it is submitted, might have been put on the broad ground that this falls within those powers which belong to the national government by the very reason of its being a government. In creating the national government, the Constitution necessarily conferred those powers which governments generally possess for their administration and self-protection; and it may well be said that the fostering of a national spirit is a proper function for a government whose strength lies in the loyalty of its citizens. If, however, a specific authority from the Constitution were still called for, the power "to raise and support armies" might well, as the court intimates, include the power to cultivate patriotism and to aid the study of military tactics.

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COLLEGE DEGREES — JUDICIAL INTERFERENCE WITH FACULTY ACTION. — The power of college authorities in the matter of granting degrees is generally regarded as absolute. For a disappointed student to take his case to the courts is therefore somewhat surprising. Yet this has occasionally been done, and a comparison of the few decisions is interesting. Curiously enough, the New York Supreme Court has been called upon three times within five years to pass on an application for a mandamus to compel the granting of a degree to a student. In *People v. N. Y. Homœopathic Medical College &c.*, 20 N. Y. Supp. 379, and in *People v. N. Y. Law School*, 68 Hun, 118, the application was refused, the court remarking, in the latter case, that a college faculty is vested with broad discretion as to the persons to be recommended for a degree, and that the case must be an extraordinary one to justify judicial interference. On



the other hand, in *People v. Bellevue Hospital Medical College*, 60 Hun, 107, the mandamus was granted, on the ground that the refusal to bestow the degree was arbitrary, and that it was not a case of the exercise of discretion. See 5 HARVARD LAW REVIEW, 205.

The statement of the court in the last named case to the effect that, when a student matriculates according to the terms of the published circular of the college, a contract arises, seems open to objection. That the relation between student and faculty is not contractual has recently been decided in England. In the case of *Green v. Master and Fellows of St. Peter's College, Cambridge*, reported in 31 Law Journal, 119, the plaintiff, who had been expelled from the defendants' college, brought an action for breach of contract, advancing the proposition that a student, on entering a college, enters into a contract with the college authorities, who agree, in consideration of his obeying all lawful rules and paying fees, to allow him to reside at the college for the length of time necessary for obtaining a degree, and to do all things requisite to enable him to obtain such degree. Mr. Justice Wills held that there was clearly no such contract, and that the case did not justify judicial interference. This decision, which finds some support in the interesting case of *Thomson v. University of London*, 33 Law J. Rep. Ch. 625, seems eminently sound.

That courts are very loath to interfere with the exercise of discretionary powers by college authorities is shown by several American cases in which aggrieved students have vainly sought relief at law from disciplinary measures adopted by faculties. See *People v. Wheaton College*, 40 Ill. 186; *North v. Trustees of University of Illinois*, 137 Ill. 296; *Dunn's Case*, 9 Pa. Co. Ct. Rep. 417.

*People v. Bellevue Hospital Medical College*, *supra*, appears to stand alone. Whether a mandamus should issue even in such a case may perhaps be doubted. And yet it seems only just that the student should have a remedy. Fortunately, the rarity of such arbitrary action on the part of college authorities renders the question one of speculative rather than practical interest.

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JUDICIAL OPINIONS LONG DRAWN OUT.—The opinion of the House of Lords in *Angus v. Dalton*, 6 Ap. Cas. 740, occupies an unusually large space in the reports; but the striking importance of the case is certainly ample justification for such exhaustive treatment. Where, however, without any such justification, some commonplace question is handled at equal length, one may well find fault. Unfortunately a tendency in this direction is only too noticeable in many of our State courts. A conspicuous example is furnished by the case of *Ry. Co. v. Transportation & Mfg. Co.*, 27 Fla. 1, which occupies one hundred and sixty-one pages of the report, one hundred and nine of which are given up to the opinions of the two judges. As far as can be gleaned from the paragraphs of the eight-page head-note, the points involved were not of especial importance. Lord Mansfield used to say that he made his opinions long for the benefit of students. That was a century ago. In the midst of the present overwhelming flood of legal literature, the judge who condenses his opinions as rigorously as is at all consistent with thoroughness is conferring a benefit on the entire profession.

MALICIOUS PROSECUTION OF A CIVIL SUIT WITHOUT ARREST OR ATTACHMENT. — In *Savile v. Roberts*, 1 Ld. Raym. 374, Lord Holt laid down the proposition that any one of three sorts of damage would support an action for malicious prosecution, namely, damage to a man's fame, to his person, or to his property. That a prosecution for a crime, which involves the first sort of damage, the bringing of a civil suit with arrest of the person, which involves the second, and the bringing of a civil suit with attachment of property, which involves the third, are actionable if induced by malice and without reasonable cause, is universally admitted. But where a civil suit is unaccompanied by arrest of the defendant's person, or attachment of his property, it has often, perhaps generally, been held that the law must regard the costs which the defendant recovers as a sufficient recompense, and that he can bring no action for malicious prosecution. See the opinion of Bowen, L. J., in *Quartz Hill Gold Mining Co. v. Eyre*, L. R. 11 Q. B. D. 674, 689; *Potts v. Inlay*, 1 South. 330; *Wetmore v. Mellinger*, 64 Iowa, 741. On the other hand, in *Lipscomb v. Shofner*, 33 S. W. Rep. 818, the Tennessee court recently held that an action would lie under such circumstances, and this decision finds considerable support in this country. See *Closson v. Staples*, 42 Vt. 209; *Eastin v. Bank of Stockton*, 66 Cal. 123; *Woods v. Finnell*, 13 Bush, 628.

It is generally admitted that some action of this nature lay at common law. But since the Statute of Marlbridge (52 Hen. III.), which allowed costs to successful defendants *pro falso clamore*, no such action has been sustained by the English courts. Those costs apparently include "the attorney's charges for preparing the case for trial in all its parts, the fees of the witnesses and the court officials, and even the *honorarium* of the barrister who conducted the case in court." 21 Am. Law Reg. N. S. 370. In this country costs are much more sparingly allowed, and are often far from a recompense for the damage sustained. It is on this ground that many of the American courts have allowed the action. Their conclusion certainly seems logical, and in accord with the general principle on which the action for malicious prosecution is based. Manifestly, in the expense to which he is put the defendant suffers damage of a sort covered by Lord Holt's analysis; and if that damage, resulting as a natural consequence of the plaintiff's malicious act, exceeds the amount of costs given under a system which makes no attempt at complete compensation, the defendant should be allowed to make good the loss by another action. The main argument against allowing it, that it would encourage interminable litigation, hardly seems conclusive. See, for a full discussion of the subject, 21 Am. Law. Reg. N. S. 281, 353.

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GENERIC AND SPECIFIC PATENTS. — A recent case decided by Judge Townsend in the second circuit, *Thomson-Houston Electric Co. v. Winchester Ave. Ry. Co.*, 71 Fed. Rep. 192, brings up the question how far an inventor is bound by the acts of the patent office in delaying an application filed by him. This point was passed upon in *Miller v. Eagle Mfg. Co.*, 151 U. S. 186, where the facts were as follows: An application for a patent being put into interference by the office was divided by the applicant. A patent was granted on the divisional application for a part of the invention. Subsequently the interference was decided in favor of the applicant, and a second patent was granted him for the rest of the invention. The drawings of both patents were identical and the specifi-



cations similar; the claims of the first patent covered one function of a combination, those of the second patent another function of the same combination. The Supreme Court in an opinion delivered by Mr. Justice Jackson held that the entire invention was disclosed by the first patent, and the second patent was void for lack of novelty.

The injustice of a decision which deprives an inventor of the fruits of his genius on account of delay by the Patent Office has been generally recognized. In the case first cited Judge Townsend refused to follow *Miller v. Eagle Mfg. Co.* The patent in suit was the one covering the overhead trolley system of electric railways which has gone into such general use in this country. The inventor filed an application covering the invention broadly, and while this was pending he took out a patent for a special form of trolley. The broad patent granted afterward was attacked for lack of novelty, but the court upheld it. The patents covered different devices so that the precise question of the *Miller* case did not arise, but the opinion is interesting as showing a tendency to restrict the scope of that decision. A similar decision was reached by Judge Cox in *Thomson-Houston Co. v. E. & H. Ry. Co.*, 69 Fed. Rep. 257, which involved the same patent.

In the following cases *Miller v. Eagle Mfg. Co.* was distinguished or cited for a narrow doctrine: *Gamewell Co. v. Signal Co.*, 61 Fed. Rep. 948; *U. S. v. Bell Tel. Co.*, 65 Fed. Rep. 86; *Reynolds v. Paint Co.*, 68 Fed. Rep. 483; *Bell Tel. Co. v. U. S.*, 68 Fed. Rep. 542. The case has been followed only once, in *Fasset v. Ewart Mfg. Co.*, 62 Fed. Rep. 404, where the facts were similar, and there was the additional circumstance that the inventor attempted by the second patent to prolong his monopoly.

On the whole it may be said that the case will be followed only when the facts are similar or when the inventor has not acted in good faith, and that no attempt to extend the scope of the doctrine will be favored by the courts. This view is supported by the opinion of the Court of Appeals for the Second Circuit in *Thomson-Houston Co. v. E. & H. Ry. Co.*, 71 Fed. Rep. 396, on appeal from the decision of Judge Cox. The court, Wallace, J., at p. 405, says: "Some observations in *Miller v. Mfg. Co.* seem to have created some misapprehension of the scope of that decision on the part of the profession, but the principles enunciated in the opinion are so plainly stated that those observations when considered in their application to the case before the court, ought not to be misconceived. The court decided in that case that the two patents . . . were in fact for the same invention, and consequently the later patent was void." This is the latest expression of opinion on the subject, and, coming from such a high authority, may be taken as conclusive.

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A MODIFICATION OF *LAWRENCE v. FOX* — BANK CHECKS. — That inconsistencies are pretty sure to follow when courts adopt a rule fundamentally wrong in principle is well illustrated by the difficulties which are being experienced by those courts which have adopted the rule of *Lawrence v. Fox* (20 N. Y. 268), namely, that a promise by A. to B. to meet B.'s debt to C. will support an action by C. against A., although C. was not a party to the contract. Such an action would not have been tolerated by the old common law, but the doctrine has gained a foothold in many of our jurisdictions. (See 8 HARVARD LAW REVIEW, 93; 9 HAR-



VARD LAW REVIEW, 233. Among the States which apply this rule there are some, including New York itself, which hold that a promise by a bank to its depositor that it will pay the depositor's debts to third persons (check-holders) will not support an action by the check-holders against the bank. It is hard to see how the cases can be reconciled on any principle, but as there is no common law principle at the bottom of the rule in *Lawrence v. Fox*, the inconsistency may presumably be treated as a determination on the part of those courts to narrow the scope of the rule, and not to apply it where the third party is merely one of an undetermined class of the promisee's creditors, instead of being a single creditor definitely named by the contracting parties.

The New York court in *Ætna Bank v. Fourth Bank* (46 N. Y. 82, 87) endeavored to distinguish the cases as follows: "*Lawrence v. Fox* was upon an express promise to pay a sum of money, received by the defendant from a debtor of the plaintiff, to the plaintiff; and the promise was the consideration upon which, and upon which alone, he received the money. . . . Here the defendant was a debtor upon a general banker's account; there was no special loan on an express promise to pay the plaintiff." In New Jersey this inconsistency exists (*Huyler's Executors v. Atwood*, 26 N. J. Eq. 504; *Creveling v. Bloomsbury Bank*, 46 N. J. Law, 255); and in Pennsylvania also (*Merriman v. Moore*, 90 Pa. St. 78; *First Bank v. Shoemaker*, 117 Pa. St. 94); but in the latter State they allow a suit if the check is for the whole amount of the deposit (*Saylor v. Bushong*, 100 Pa. St. 23), on the theory that such a check is an assignment of the funds in the bank,—an objectionable doctrine, it would seem, when it is remembered that a bank, instead of holding any specific funds of the depositor, is merely his debtor, and that a check is an order to pay, in the nature of an unaccepted bill of exchange. In Maryland and Michigan, states which follow *Lawrence v. Fox*, the courts seem to deny the right of a check-holder to sue the bank, although the point does not appear to have been directly adjudicated. (*O'Neal v. School Commissioners*, 27 Md. 227; *Moses v. Franklin Bank*, 34 Md. 574; *Crawford v. Edwards*, 33 Mich. 354; *Brennan v. Merchants' Bank*, 62 Mich. 343.) Perhaps the most interesting example of this inconsistency is in Colorado. In *Lehow v. Simonton* (3 Colo. 346), a third party, to whom the money was by the contract to be paid, was allowed to sue on the contract; but in *Boettcher v. Colorado Bank* (15 Colo. 16), a suit by a check-holder against the bank was decided in favor of the bank; one judge, however, feeling himself bound by *Lehow v. Simonton*, dissented, on the ground that the cases were indistinguishable.

A number of authorities on this point are cited in a recent and carefully considered case in Ohio (*Cincinnati H. & D. R. R. Co. v. Metropolitan Bank*, 42 N. E. Rep. 700), which holds that the check-holder has no right of action against the bank for refusal to pay the check.

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CONVERSION BY A PLEDGEE.—Two recent cases, *Waring v. Gaskill*, 22 S. E. Rep. 659 (Ga.), and *Richardson v. Ashby*, 33 S. W. Rep. 806 (Mo.), are authority for the proposition that where a pledgee tortiously sells his pledge, or repledges it for a greater sum than the debt for which it is security, the pledgor has an immediate right to bring an action in trover without tendering the amount of his indebtedness. What little law

there is on this subject is unsettled. It would seem the more natural step to bring an action for violation of the contract of pledge, or to tender payment before bringing the action of trover. In the action on the contract, at least, an equitable defence would be allowed. The plaintiff's damages would be diminished by the amount of his debt to the defendant, the pledgee.

On the precise question involved in the two cases cited there is a conflict of opinion. In England the law is contrary to these authorities. The first English case on the subject, *Johnson v. Stear*, 15 C. B. N. s. 330, held that the pledgee's act was conversion, but that the amount of damages should be only the pledgor's actual loss, — that the pledgee's interest in the pledge at the time of the conversion should be taken into account. Mr. Justice Williams in an able dissenting opinion maintained that the pledgee stood in practically the same position as a factor, — that by his act the pledgor regained immediate right of possession, and was entitled to judgment in trover for the full value of the goods. Obviously, if there was conversion at all, full damages should have been awarded. Two later cases, *Donald v. Suckling*, L. R. 1 Q. B. 585, and *Halliday v. Holgate*, L. R. 3 Ex. 299, practically overruled *Johnson v. Stear* by holding that there was no conversion. To support this view, the court maintained that a pledge is something more than a mere bailment, and that the pledgee, by parting with possession, does not lose his special property in the pledge. Mr. Justice Shee dissented in *Donald v. Suckling* on the grounds put forth by Mr. Justice Williams in the earlier case. Nevertheless, these two cases represent the English law.

In the United States the question is still open. Some courts adopt the English view without question or hesitation. Others maintain the views adopted by Georgia and Missouri courts. The English doctrine would seem to be the less satisfactory. There is no cogent reason for holding that the pledgee gets so much more extended rights than a bare bailee that he can dispose of the article pledged without losing his lien. It would seem more natural and consistent that, apart from the privilege of pledging up to the amount of the original security, — a proceeding which in no way affects the first pledgor's position, — the pledgee should have no more right than the factor holding his principal's goods, on which he loses his lien in parting with possession. Just as the pledgor may maintain trover for destruction of the pledged goods by the negligence of the pledgee, so should he be allowed trover when the pledgee has repledged the goods for an amount greater than the original pledgor's indebtedness to him.

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RESPONDEAT SUPERIOR IN THE CASE OF CHARITABLE CORPORATIONS.— Is the doctrine of *respondeat superior* to be applied to charitable corporations? A résumé of the judicial decisions in point may start appropriately with the case of *Duncan v. Findlater*, 6 Cl. & Fin. 894 (1839), decided on appeal from the Scotch Court of Session. The only importance of the case lies in a dictum by Lord Cottenham to the effect that the funds of a body incorporated for public purposes can never be diverted from those purposes to the payment of damages which are recovered for injuries caused by the negligence of the servants of the corporation; and that a suit for such damages is consequently idle, and will not be entertained by the courts. This view was reaffirmed and applied to charitable corporations



in *Feoffees of Heriot's Hospital v. Ross*, 12 Cl. & Fin. (1846), also a Scotch appeal case. *Holliday v. St. Leonard's Parish*, 11 C. B. N. S. 192 (1861), although dealing with the liability of a local surveying board, lays down a rule which is often invoked to protect charitable corporations: "Persons intrusted with the performance of a public duty, discharging it gratuitously, and themselves taking no personal share in the mode of its performance, are exempted from liability for the negligent acts of the persons employed by them." (Per Erle, C. J., p. 204.) The great case on this point of law was decided in the House of Lords in 1866 ("*Mersey Docks and Harbor Board*" *Trustees v. Gibbs*, L. R. 1 H. L. 93). This case also, though not dealing with charitable corporations, is applicable to them. The court overthrows the dictum in *Duncan v. Findlater*. Trustees here managed certain docks solely for the public benefit; but according to the terms of the incorporating statutes, as interpreted by Blackburn, J., a duty was imposed upon the corporation "to take reasonable care that they" (i. e. the docks) "were in a fit state" for public use; and it was held that the corporation, despite its public nature, could not rid itself of liability for non-performance of its duty, by relegating performance of that duty to its servants. The funds of the corporation were held applicable to the payment of damages recovered for breaches of duty. *Foreman v. Mayor &c.*, L. R. 6 Q. B. 214 (1884), marks the limit reached by the English cases. A servant of the local board of highway surveyors had negligently left stones on the highway. It does not appear whether this was a breach of the duty imposed on the board, or mere collateral negligence of the servant. It was said, however, that a corporation established for public purposes was liable for the negligence of its servants to the same extent that a private person or private corporation would be liable; and it was also said that *Mersey Docks &c. Trustees v. Gibbs* had overruled *Holliday v. St. Leonard's*, though not by name.

In *Donaldson v. Commissioners &c.*, 30 New Bruns. Rep. 379 (1890), plaintiff brought suit against a hospital for negligent treatment at the hands of the hospital physicians and nurses. The defendant's demurrer admitted the alleged duty to see that its patients received proper treatment, but rested its defence on the broad claim that a charitable corporation is not liable for torts of its servants, and cited *Holliday v. St. Leonard's*, and the earlier House of Lords cases, *supra*. It was properly held, however, that as the defendant had admitted a duty to bestow careful treatment, it was liable for non-performance of that duty, although the non-performance was due to its servants' negligence. This case plainly goes no farther than *Mersey Docks &c. Trustees v. Gibbs*.

In the United States, the decisions are irreconcilable. *Downes v. Harper Hospital*, 101 Mich. 555 (1894), takes the extreme view supported in *Feoffees &c. v. Ross*, *supra*, that a charitable corporation can never be liable for the negligence of its servants. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432 (1876), and *Union Pacific Ry. Co. v. Artist*, 60 Fed. Rep. 365 (1894), take a middle ground, that the duty of a charitable hospital corporation is confined to the exercise of reasonable care in furnishing suitable accommodations and competent attendants; and that beyond the performance of these duties there is no liability of the corporation for the negligence of its servants. *Glavin v. R. I. Hospital*, 12 R. I. 411 (1879), on the other hand, holds that, once the relation



of servant and master is made out, a charitable corporation is liable for its servants' negligent acts, — adopting the doctrine of *Foreman v. Mayor &c.*

Despite *Downes v. Hospital*, *supra*, it is generally law then that a corporation designed for charitable (or public) purposes is liable for the non-performance of whatever duty may be imposed upon it; nor is it a sufficient answer to allege that its non-performance was due to its servants' negligence, or that it possessed no funds but those dedicated to carrying out its charitable or public purposes. The exact extent of the duty imposed is often a troublesome question. That difficulty, however, does not affect the liability of a corporation once the duty is determined. But the decisions cited *supra* show that the question whether, beyond this liability for the non-performance of duty, there is a liability for the negligence of the corporation's servants, is still open. The English courts (*Foreman v. Mayor &c.*, *supra*) now decline to recognize any distinction in applying the doctrine of *respondeat superior* to charitable and to business corporations. Yet this doctrine has never been sustained on satisfactory grounds; it has been vigorously assailed at times (see Parliamentary Blue Book on the Employers' Liability Bill, 1877; testimony of Bramwell and Brett, L. JJ., pp. 58, 59, 115, 119), and is questioned in Pollock on Torts, 2d edition, 69, 70. It may be well doubted, therefore, whether it should be extended to the case of charitable corporations, where it is more likely to impair than to secure substantial justice. The Connecticut Supreme Court in the last decided case on the point (*Hearns v. Waterbury Hospital*, 33 Atl. Rep. 595), after a careful and exhaustive consideration of authorities, has refused to make such an extension. The outcome of a similar case, at present awaiting decision in the New Hampshire Supreme Court, will be watched with interest.

Of course if, in certain circumstances, a charitable corporation can be said to be a servant of the public in the sense that an officer of state is such a servant, the doctrine of *respondeat superior* is inapplicable on other grounds.

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## RECENT CASES.

AGENCY — LIBEL — LIABILITY OF MANAGING EDITOR OF NEWSPAPER. — *Held*, where the managing editor of a newspaper is also an officer of the corporation owning the paper, he is equally liable with the publisher and proprietor for the consequences of a libellous publication, and mere want of knowledge on his part is no defence, since it is his business to know. *Smith v. Utley*, 65 N. W. Rep. 744 (Wis.).

If in this case the libellous matter actually passed through the hands of the managing editor to those employed in the actual work of printing, there is no question of his liability. It is a positive act, like a trespass on land. But assuming that it did not so happen, the case turns on the distinction between nonfeasance and misfeasance. Did the editor by assuming his position so interfere, and play such an active part, that he became responsible to third persons for the careful conduct of the paper? It seems difficult to say that he did not, and yet it has been held that a general agent, having control of real estate, cannot be held for injuries received from the falling of a door on account of its being out of repair. *Baird v. Shipman*, 132 Ill. 16. The fact that the editor here was an officer of the corporation has no bearing on the matter.

AGENCY — WHEN KNOWLEDGE OF AGENT IS KNOWLEDGE OF PRINCIPAL. — Where the agent of an insurance company has acquired knowledge of outstanding

over-insurance, by virtue of his relation as attorney for the party insured and in a transaction wholly foreign to the business of the company which it is his duty to transact, his knowledge does not estop the company. *Union Nat. Bank v. German Ins. Co.*, 71 Fed. Rep. 473.

The general statement that knowledge of the agent is knowledge of the principal means that the knowledge of the agent is so when acquired in a transaction which is part of the agency. Knowledge acquired in a wholly collateral proceeding cannot be imputed to the principal. It is on this ground the case rests, and not on the fact that the statements between attorney and client are confidential. In *Trentor v. Pothén*, 49 N. W. Rep. 129, and in *St. Paul Ins. Co. v. Parsons*, 50 N. W. Rep. 240, a full discussion of the subject will be found.

**BILLS AND NOTES — INNOCENT PURCHASER — KNOWLEDGE AT TIME OF ACTION BROUGHT OF AN EQUITABLE DEFENCE.** — A bill was drawn on and accepted by the defendant payable to the drawer, and by him indorsed to the plaintiff, an innocent purchaser. The bill was dishonored at maturity, but before trial was begun in this action the plaintiff learned that between the drawer and the defendant there was a failure of consideration. The plaintiff held at the time of dishonor, and still holds, sufficient funds of the drawer to pay the bill, but neglects to appropriate them and prosecutes this action at the instigation of the drawer. *Held*, the funds of the drawer in the hands of the plaintiff should be offset against the bill. *Van Winkle Machinery Company v. Citizens' Bank*, 33 S. W. Rep. 862 (Tex.).

The result reached is eminently satisfactory and seems correct. The true ground would seem to be that under the circumstances the drawer became the real debtor, for whom the defendant was a surety, who, when sued by the creditor, is entitled to set off any assets of his principal in the hands of the plaintiff.

**BILLS AND NOTES — UNACCEPTED CHECK.** — A bank is not liable to a check-holder in a suit on the check, although it has funds of the drawer more than sufficient to pay the check. The question arose on demurrer. *Cincinnati, Hamilton, & Dayton R. R. Co. v. Metropolitan Nat. Bank*, 42 N. E. Rep. 700 (Ohio).

Ohio thus accords with the majority of jurisdictions; a few States are *contra*. 2 Randolph on Commercial Paper, 280; 2 Daniels on Negotiable Instruments, § 1638. See NOTES.

**CONFLICT OF LAWS — DOMICIL — EVIDENCE OF CHANGE — RESIDENCE AT VARIOUS PLACES.** — D.'s domicile of origin and birthplace were Scotch. At the age of eleven he went to school in England, remaining there for eight years, but spending vacations in Scotland. He then went to Media for five years, there becoming a priest in the Church of England. He returned to Scotland for six months. For twenty-six years thereafter he served in eight or more churches in England, spending however a year upon the Continent, another in Scotland, and two in Grenada. During all these years, unless abroad, D. spent two or three months in each year in Scotland. In England he lived principally in apartments and in the houses of others, but soon after marriage, in 1872, took a house for three months, and later the lease of another for seven. His wife died in 1891, the question being as to D.'s domicile at the time of her death. *Held*, that it was Scotch. *In re Dunbar*, 12 The Times Law Rep. 153.

The court thought that the domicile of origin had never been changed, though the case did not require a decision as to this. The case exhibits a tendency to follow *In re Patience*, 29 Chan. Div. 976, although its facts would seem to bring it within the decision of *In re Craignish*, L. R. [1892] 3 Chan. 180. American courts have less difficulty in finding a change of domicile. *Williams v. Roxbury*, 12 Gray, 21; *Wilbraham v. Ludlow*, 99 Mass. 587; *Hicks v. Skinner*, 72 N. C. 1.

**CONSTITUTIONAL LAW — GETTYSBURG RESERVATION.** — Under an act of Congress providing for monuments and tablets at Gettysburg "for the purpose of preserving the lines of battle at Gettysburg, Pa., and for properly marking with tablets the positions occupied by the various commands," proceedings were begun for the condemnation of land. *Held*, the act is within the constitutional power of the national legislature. *United States v. Gettysburg Electric Ry. Co.*, 16 Sup. Ct. Rep. 427. See NOTES.

**CONTRACTS — ACCORD AND SATISFACTION.** — Plaintiff and defendant disagreed as to the amount due the former as commission for a sale. Defendant sent a check for the amount admitted by him to be due plaintiff, and enclosed a voucher, to be signed and returned by plaintiff, acknowledging receipt of the check "in full payment for commissions." Plaintiff kept and used the check, but did not return the voucher. *Held*, by accepting the check, plaintiff had precluded himself from disputing the fact that the check was full payment. *Nassoiv v. Tomlinson et al.*, 42 N. E. Rep. 715 (N. Y.).

The claim here being for an unliquidated sum, and plaintiff having accepted the



check, an accord and satisfaction is fairly shown. Plaintiff had no business to keep and use the check otherwise than on the conditions on which it was sent. As the court aptly puts it, "When he indorsed and collected the check referred to in the letter asking him to sign the enclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered." 2 Parsons on Contracts, 8th ed., p. \*687 and note 4, has a discussion of the subject. In connection with this subject it is interesting to note a case just decided in Michigan, where plaintiff, having received a sum for wages minus the amount of a railway fare, which defendant expressly refused to allow, and having given a receipt in full, was held thereafter precluded from successfully suing on the claim for the fare, though both parties admitted the sum actually paid to be due so far as it went. *Tanner v. Merrill*, 65 N. W. Rep. 664 (Mich.). Two judges dissent, on the ground that payment of a debt admittedly due is no consideration for a discharge of a further claim. But as the two claims were not separate, and the payment and receipt were given for a lump amount which was unliquidated, the case would seem to be analogous to the New York case.

**CONTRACTS — ILLEGALITY.** — The plaintiff and defendant had entered into a partnership to carry on certain faro and crap games. The plaintiff now sues for his share of the proceeds in the hands of his partner. *Held*, that where the illegal contract has been carried out, the illegality of the contract is not a bar to calling the partner who holds the profits to account. *McDonald v. Lund*, 43 Pac. Rep. 348 (Wash.).

The decision in this case is carefully reasoned out and well supported by authorities cited, yet it does not appear sound. The plaintiff's claim is founded on the contract, and allowing a recovery is carrying the contract into effect. The better mode of dealing with such cases is to leave the parties remediless. The vice of the contract enters into the settlement, and the law should interfere to aid neither when both are *in pari delicto*. *Dixon v. Olmstead*, 9 Vt. 310; *Embrey v. Emison*, 131 U. S. 336; *Harvey v. Merrill*, 150 Mass. 1; 2 Parsons on Contracts, 8th ed. p. \*747, and cases cited.

**CONTRACTS — PUBLIC POLICY — AGREEMENT TO WAIVE CLAIM FOR NEGLIGENCE.** — Where an employee joins a voluntary relief association to which he contributes, and his employers guarantee the obligations, pay the operating expenses, make up deficits in the fund, supply surgical attendance, etc., an agreement by him in his voluntary application for membership that acceptance of benefits from the association for an injury shall operate as a waiver of his claim for damages, is not void as against public policy. *Otis v. Pennsylvania Co.*, 71 Fed. Rep. 136.

Where under a similar agreement he elects to accept aid from the association in ignorance of the strength of his claim against the company, it was *held* in another recent case that the effect of his election, in barring an action against the company, is not avoided. *Vickers v. C. B. & Q. R.*, 71 Fed. Rep. 139.

Both decisions are amply supported by the authorities cited. It is the election given to the employee either to receive aid from the association or to sue the company, that removes the objection that the contract is one to avoid liability for one's own negligence. Contracts of the latter class are of course void. *Roesner v. Hermann*, 8 Fed. Rep. 782; *Runt v. Herring*, 21 N. Y. Supp. 244.

**CONTRACTS — THE POWERS OF COLLEGE AUTHORITIES.** — Plaintiff, who had been expelled from defendants' college, brought an action for breach of contract, alleging that the expulsion was unlawful. *Held*, that the relation between a student and his college is not contractual, that there was no ground for judicial interference, and that plaintiff's only remedy was by appeal to the Visitor. *Green v. Master and Fellows of St. Peter's College, Cambridge*, 31 Law Journal, 119. See NOTES.

**CORPORATIONS — LIABILITY OF CHARITABLE CORPORATION FOR NEGLIGENCE OF ITS SERVANTS.** — *Held*, a charitable corporation (in this case a hospital) is not liable for injuries to a patient due to negligent treatment by the physicians and nurses in its employ where it has exercised due care in their selection. *Hearns v. Waterbury Hospital*, 33 Atl. Rep. 595 (Conn.). See NOTES.

**CORPORATIONS — MISAPPROPRIATION BY DIRECTORS.** — *Held*, that one who holds stock as collateral may maintain a bill against the directors whose misappropriation impairs his security. *Green v. Hedenberg*, 42 N. E. Rep. 851 (Ill.).

An English case decided in 1852 held that a *cestui que trust* of shares in a railway could, by joining its trustee, maintain a bill against the directors alleging certain illegal acts were in contemplation. *Ry. v. Rushout*, 5 De G. & S. 290. In 1879 the Supreme Court of Minnesota held that an action would lie by pledgees of stock against the directors, not in the name of the corporation, but directly to protect their own interest against a breach of trust. *Baldwin v. Canfield*, 26 Minn. 43. The principal case follows this latter decision without comment.



## CORPORATIONS — ULTRA VIRES — LAWFUL ACT FOR UNLAWFUL PURPOSE. —

The receiver of an insolvent national bank sued a State bank for an assessment made upon shares of an insolvent bank owned by the defendant corporation, which pleaded that it did not become possessed of the shares by way of pledge, upon execution, or upon compromise of a debt, the only ways in which it lawfully might; that its president had bought the stock and caused its transfer to the defendant, against provisions of both Federal and State statutes. *Held*, that the defendant could not "set up its own violation of law to escape the responsibility resulting from its illegal action." *State Bank v. Hawkins*, 71 Fed. Rep. 369.

The court carefully distinguishes between *ultra vires* in the sense of a lack of corporate authority to perform the act in question under any circumstances, in which case it is available as a defence to either party to the contract, and *ultra vires* as applied to an act which the corporation is authorized to perform for a specific purpose, and which has been performed for an unauthorized purpose, in which case it is not. The present decision falls within the latter class. On the first point, see *C. T. Co. v. Pullman Co.*, 139 U. S. 24; 8 HARV. LAW REV. 506. The principal case cites numerous authorities upon the second point. See especially *Bank v. Matthews*, 98 U. S. 621; *Fritts v. Palmer*, 132 U. S. 282; *Ditch Co. v. Zellerbach*, 37 Cal. 543.

## CORPORATIONS — ULTRA VIRES CONTRACT — SURETY. — A. contracted with a

county to furnish water supply. B. signed A.'s bond as surety. The county paid the contract price in advance and A. refused to perform, on the ground that the contract was *ultra vires*. *Held*, (1) A. is liable to the county on a *quantum meruit* for the consideration so paid; (2) B. cannot be held as surety for this liability. *Edwards County v. Jennings*, 33 S. W. Rep. 585 (Tex.).

It is well settled in many jurisdictions that where one party to a contract has performed and the other party repudiates and sets up the defence of *ultra vires*, the party so repudiating is liable on a *quantum meruit*. See *R. R. Co. v. Keokuk Co.*, 131 U. S. 389. The principal case is interesting as bringing out very clearly the nature of this liability. It results from the invalidity of the contract, and is not in any sense grounded on the contract itself. Therefore the surety whose liability was only on the contract was not bound. The rule that a surety will not be held beyond his original liability is elementary. See opinion of Judge Story in *Meller v. Stewart*, 9 Wheat. 680.

EQUITY — CONVEYANCE IN FRAUD OF INTENDED HUSBAND. — A., ten days before her marriage to B., voluntarily conveyed her real estate to C. without the knowledge of B. A child was born and A. died. C. conveyed to D., who conveyed to the child, both deeds reciting a nominal consideration. *Held*, such conveyances were in fraud of the marital rights of the husband, and void as to him. Therefore he is entitled to his curtesy. *Leary v. King*, 33 Atl. Rep. 629 (Del.).

Before the modern Married Women Acts the doctrine was universal that a voluntary secret conveyance by either husband or wife during the engagement and before marriage was a fraud on the marital rights of the other, and void to that extent. *Strathmore v. Bowes*, 1 Ves. Jr. 22; see also collection of authorities in 1 Wh. & T. L. C. 317. Under the modern statutes the courts have shown no disposition to alter the doctrine, and the rule remains substantially the same. *Duncan's Appeal*, 7 Wright, 67; *Beere v. Beere*, 44 N. W. Rep. 809 (Ia.); *Murray v. Murray*, 13 S. W. Rep. 244 (Ky.); *Ferebee v. Pritchard*, 16 S. E. Rep. 903 (N. C.).

EQUITY — UNAUTHORIZED USE OF PUBLIC FUNDS — ATTORNEY GENERAL ONLY CAN ENJOIN. — By statute an appropriation was made for the erection of an insane asylum and defendants were thereby appointed as commissioners to locate and build the asylum. One Taylor filed a bill in equity in the name of the State as plaintiff, alleging that this statute was unconstitutional and that the expenditure of the State's money in the erection of the asylum was therefore unauthorized. The bill prayed that defendants be enjoined from expending the appropriation. *Held*, that equity has no jurisdiction to interfere. *State v. Lord*, 43 Pac. Rep. 471 (Ore.).

The decision is handed down in a lengthy but interesting opinion by Wolverton, J. He supports the result on several distinct grounds. The most satisfactory of these grounds appear to be that the Attorney General does not appear as a party to the bill; that the bill must therefore be taken as if filed in the name of Taylor; that on the allegations of the bill no property right of Taylor's will be infringed by the proposed expenditure; that the Attorney General is the only proper party to ask an injunction against an unauthorized use of public funds; that the bill does not therefore disclose any ground on which equity can take jurisdiction at the instance of Taylor. The opinion goes on to consider under what circumstances equity will take jurisdiction of a bill for an injunction filed by the Attorney General in behalf of the State.

**EQUITY—WRONGFUL CONVEYANCE BY TRUSTEE—RIGHTS OF PURCHASER AFTER PARTIAL PAYMENT.**—This was a bill by a *cestui* to recover land wrongfully conveyed by the trustee to defendant. Defendant claimed an indefeasible title as purchaser for value without notice. It appeared that part of the purchase money had been paid before notice. The court directed that defendant should convey. *Held*, that this was correct, since defendant, to insist on his right to retain the legal title as security for the money paid in good faith, should have claimed this in his answer. *Webb v. Bailey*, 23 S. E. Rep. 644 (W. Va.).

While it is too late to contend that a purchaser in a case like this should have an indefeasible title, still, as the court admits, he has an equity *pro tanto* for money paid before notice. *Perry on Trusts*, § 221. Under the modern doctrine one seeking to recover land wrongfully conveyed by a trustee must allege in his bill that defendant is not a *bona fide* purchaser for value. *Moloney v. Rourke*, 100 Mass. 190. How then can it be said plaintiff was entitled to the relief the court has given him in the principal case when it clearly appears defendant has rights as a *bona fide* purchaser for value? The rights of a *bona fide* holder of a bill or note under like circumstances would seem to be analogous. *Dresser v. Ry. Co.*, 93 U. S. 92.

**EVIDENCE—ATTEMPT AT MODIFICATION ON A NEW TRIAL.**—On a new trial the evidence of the plaintiff's witnesses was changed with the apparent purpose of avoiding the decision of the appellate court. *Held*, the evidence of the witnesses at the former trial is to be taken as the fact. *Williams v. D. L. & W. R. R.*, 36 N. Y. Supp. 274.

It would seem to be plain law that when a new trial is ordered in general terms the issues of fact are again open for determination upon the evidence adduced. *Hadden v. Jordan*, 28 Cal. 301. It does not clearly appear in the principal case that the witnesses at the two trials were the same persons, but if so the discrepancies in their testimony would merely serve to impeach their credibility. *Chamberlayne's Best on Evidence*, 634.

**EVIDENCE—PAROL EVIDENCE.**—A., B., and C., nephews of one X., since deceased, occupied certain lands belonging to X., executing a lease for two years, which was extended from time to time. After the uncle's death, the nephews set up against certain devisees an oral agreement made with them by X. that the lands should be theirs at his death. There were provisions in the lease seemingly inconsistent with such an agreement, particularly in the last extension, which apparently gave X. power to sell. *Held*, the court is competent to reconcile on a reasonable basis these inconsistencies; and on the whole there is sufficient evidence of the parol portion of the agreement to justify the granting of specific performance. *Jenkins, J.*, dissenting. *Harman v. Harman*, 70 Fed. Rep. 894.

The case defines the extent of the rule allowing parol evidence when an entire contract is originally verbal and a part only is reduced to writing, namely, that the parol portions of such an agreement must be made out clearly and satisfactorily, and must not contradict the written portion. For a statement of the rule, see 1 *Greenleaf, Evidence*, 284 a (13th ed.); *Ballston Bank v. Marine Bank*, 16 Wis. 120, 136.

**EVIDENCE—PAROL EVIDENCE RULE.**—The plaintiff was tenant to the defendant under a written lease, and brings this action for injury from non-repair of house. Parol evidence was offered to show that in addition to the terms of the written contract the defendant had undertaken to repair the tenement. This evidence was rejected. *Held*, that no attempt was made to vary the written contract, but the evidence offered tended merely to establish a collateral stipulation concerning the same subject matter, and should have been admitted. *Hines v. Wilcox*, 33 S. W. Rep. 914 (Tenn.).

The exception to the "parol evidence rule" recognized in this case is well established. *Greenleaf, Evidence*, § 284 a, note b; *Best's Evid.*, § 226 A, and cases cited. The collateral contract should be very distinctly collateral. Previous decisions, however, have gone as far as the present in this respect. *Ayer v. Bell Mfg. Co.*, 147 Mass. 46, and cases referred to above.

**GIFT OF GROWING CROPS—DELIVERY.**—A life tenant of certain land gave plaintiff by parol a growing crop of corn. Before the crop was ripe, the life tenant died, and the remainderman conveyed his interest in the land to the defendant. Plaintiff brings an action to enjoin defendant from appropriating the corn crop to her use. *Held*, that life tenant could dispose of growing crops by gift, and his gift to plaintiff was valid. *Shaffer v. Stevens*, 42 N. E. Rep. 620 (Ind.).

It is well understood that a gift, unaccompanied by actual or constructive delivery of the property given, is not valid. In *Noble v. Smith*, 2 Johns. (N. Y.) 52, Chief Justice Kent decided that growing corn was susceptible of delivery only by putting the donee in possession of the soil, and that anything less than this left the gift ineffectual.



It would seem, therefore, in the principal case, that the growing corn passed to the life tenant's executor (Taylor, Landlord & Tenant, § 534), and that the plaintiff had no interest in it.

**JUDGMENTS—RES ADJUDICATA.**—The defendant was arrested and an order of deportation issued under the Chinese Exclusion Act. She had previously been arrested and discharged on *habeas corpus* proceedings. *Held*, that though the discharge was obtained by perjury and a fraudulent writing, it was decisive of the present case, and the order of deportation must be reversed. *U. S. v. Chung Shee*, 71 Fed. Rep. 277.

This is sound, and in accord with previous decisions. Collateral impeachment of a judgment in *habeas corpus* can be made only on the ground of want of jurisdiction. Freeman, Judgments, § 619. Judgments in general are not subject to collateral attack by parties on the ground set forth in this case. See Freeman, § 334, and Wells's *Res Adjudicata*, Chap. I. Sec. 9.

**LIFE INSURANCE—RIGHTS OF BENEFICIARY.**—By statute the beneficiary in a life policy is entitled to the proceeds of the policy, not exceeding \$10,000, free from the claims of creditors of the insured, though the premiums were paid by him. *Held*, that a man's wife, the beneficiary in several policies maintained by him, may retain the proceeds, though it turns out his estate is bankrupt and the proceeds exceed \$10,000, since it did not appear that he paid premiums after bankruptcy. A policy payable to a beneficiary is not part of the estate of the person who pays the premiums. *Jones v. Putty*, 18 So. Rep. 794 (Miss.).

The decision is in accord with the weight of authority that the beneficiary named in a policy has a vested right with which the insured cannot interfere. *Pingrey v. Ins. Co.*, 144 Mass. 374, 1 HARV. LAW REV. 156; *Garner v. Ins. Co.*, 110 N. Y. 266, 2 HARV. LAW REV. 239; Bliss on Life Ins. § 318; Beach on Ins. § 602. But see 17 Western Jurist, 297. This seems the better view. It is difficult to say just what the nature of this right is because of the confusion on the subject of the rights of beneficiaries in contracts. It is not a trust, since there is no *res* held in trust, and yet it has elements similar to a trust. There is a difficulty, however, when premiums are paid by a bankrupt. Even without a statute it would seem that a reasonable provision may be made for his family by a bankrupt. *Central Bank v. Hume*, 128 U. S. 195; *McCutcheon's Appeal*, 99 Pa. St. 133. Cf. *Stokes v. Coffey*, 8 Bush, 533.

**MORTGAGE—DEFECTIVE RECORD OF INSTRUMENT.**—A mortgage left at the recorder's office is to be regarded as recorded from that time, in spite of the fact that it is actually recorded in the wrong book. *Furribee v. McKerrihan*, 33 Atl. Rep. 583 (Pa.).

This may be regarded as the settled doctrine in Pennsylvania since the case of *Gluding v. Frick*, 88 Pa. St. 460, which overruled *Luck's Appeal*, 44 Pa. St. 519, going back to the case of *M'Lanahan v. Reeside*, 9 Watts, 511. The rule may seem harsh on a purchaser, but that the owner of land should suffer for the negligence of the recorder seems equally hard. Many instruments may be wrongly recorded in the absence of negligence, as where they appear to be deeds, but are in fact mortgages. Should they be held unrecorded until after some court has passed on their character, and so enabled them to be entered on the right book? What if the court then reverses its decision? Must the owner wait till then before he can rely on the record? He has done all that is required of him when he deposits the deed in the hands of the recorder. That is all the statute demands of him. Of course, if it exacted not only a recording, but a re-recording in such and such a book, a different decision might be reached.

**PATENT LAW—GENERIC AND SPECIFIC PATENTS.**—The issue by the patent office of a specific patent covering part of an invention for which an application is pending in the office is not an anticipation of the broader patent when it is issued. *Thomson-Houston Electric Co. v. E. & H. Ry. Co.*, 71 Fed. Rep. 396. See NOTES.

**PERSONS—MARRIAGE AFTER DIVORCE—VALIDITY OF PROHIBITED MARRIAGE.**—*Held*, that where, under a statute, the decree of divorce prohibited the offender's marrying again, a marriage in spite of this is not void, there being no nullity clause in the statute. *Crawford v. State*, 18 So. Rep. 848 (Miss.).

Being *res nova* in Mississippi, the court avowedly adopts this view against the weight of authority. It examines the nature of the marriage contract, and finds strong grounds of public policy for holding such marriages valid when the statute will permit. The tendency of the courts to do this is pointed out in the cases that have arisen under statutes regulating the manner of solemnizing marriages. See Bishop, Mar., Div. & Sep., §§ 449, 698, 707. On the other hand, the Supreme Court of Vermont in the recent case of *Ovitt v. Smith*, 33 Atl. Rep. 769, holds such a marriage void, on the ground that a marriage contract, like any other contract, is void when prohibited by law.

**PLEDGE—PLEDGEE CONVERTS BY REPLEDGING.**—*Held*, that a pledgee, who repledges for an amount greater than the pledgor's debt the goods entrusted to him on the contract of pledge, is guilty of conversion. The pledgor has an immediate right of action in trover without tendering payment of the debt. *Richardson v. Ashby*, 33 S. W. Rep. 806 (Mo.). See NOTES.

**PROPERTY—BUILDING HIGH FENCE—MALICE.** A. and B. owned adjoining lots. A.'s house was built on the boundary line. B. on his own land erected a high fence so as to completely shut off the light and air from the windows of A.'s house. B. acted purely from malicious motives. *Held*, A. had no remedy at law or in equity. *Letts v. Kessler*, 42 N. E. Rep. 765 (Ohio).

The case is interesting as an extreme application of the rule that an act legal in itself does not become illegal because actuated by a malicious motive. This rule is sustained by the great weight of authority, especially in cases where the act is a malicious use of a property or contract right. *Stevenson v. Newnham*, 13 C. B. 285 (Eng.); *Chaffield v. Wilson*, 28 Vt. 49. *Chesley v. King*, 74 Me. 164, *Is contra*, but its authority is greatly diminished by the decision in *Heywood v. Tillson*, 75 Me. 225. *Bartlett v. O'Connor*, 36 Pac. Rep. 513 (Cal.), *contra*, is ill considered and entitled to little weight.

The civil law, in cases of adjoining owners, allowed an action for the malicious use of property rights. D. 39, 3, 1, 12 (Ulpian). The Scotch and German courts have followed the civil law, and are therefore opposed to the common law rule. In Massachusetts there is a statute giving a remedy in case of malicious erection of fences. St. 1887, c. 348.

**PROPERTY—DEDICATION OF STREET.**—The plaintiff sued for a trespass by defendant company in laying gas pipes on certain land of his. The defendant claimed that the land had been dedicated as a public street, and offered in evidence a deed by plaintiff conveying adjoining land and reserving the land in question as that piece "lying within the lines of Bates Street as laid out upon the city plan." *Held*, that such a plotting did not amount to an actual dedication, nor was the plaintiff estopped to deny any public right of way over the land. *Patterson v. People's Natural Gas Co.*, 33 Atl. Rep. 575 (Pa.).

This decision seems undoubtedly correct. A parol dedication to the public must be more than prospective to have any effect. *Cincinnati v. White*, 6 Peters, 431. The reference to this land as a street in the deed did not give rise to any public right of way. *Leigh v. Jack*, 5 Ex. Div. 264.

**PROPERTY—RIPARIAN RIGHTS—ACCRETION.**—Plaintiff owned a farm on the east bank of the Missouri River. An island formed in the east half of the river and opposite plaintiff's farm. By accretion to the island the river channel between the island and plaintiff's farm was gradually choked up, and finally the entire body of the Missouri flowed through what had formerly been the western channel. *Held*, that a riparian owner on the Missouri owns the soil to the river's edge only, and not to the thread of the stream; that consequently plaintiff's western boundary was not affected by the closing up of the eastern channel. *Perkins v. Adams*, 33 S. W. Rep. 778 (Mo.).

There is a conflict of authority as to whether a riparian owner on the great inland rivers owns to the thread of the stream or only to the water's edge. Kent's Comm., 12th ed., Vol. III. pp. \*428-\*431. A long line of decisions has firmly established the latter doctrine in Missouri. It follows as a consequence of this doctrine that an island which forms in such a river does not become the property of the riparian owners. In the principal case as long as any part of the Missouri could be said to flow to the east of the island, plaintiff's claim was limited to the eastern edge of the eastern channel. At some particular moment the entire body of the Missouri began to flow through what had been the western channel. Plaintiff could not claim that he, by this sudden change in location of the eastern bank of the Missouri, became entitled to the very appreciable body of land lying between the new location of the eastern bank and its location immediately before the change occurred.

**PROPERTY—RULE AGAINST PERPETUITIES—RESTRAINT ON ALIENATION.**—The testator, being in partnership with his son and another, directed that said partnership should continue so long as his son or any of his son's children should desire, the firm to have the use of real estate now occupied, paying rent therefor, and of the tools and other assets comprising testator's share of the capital. Subject to these provisions, he gives all his property, including his share of the partnership income, to a charity; if the partnership ceases for any cause, he gives one fourth of his share of the firm property to his son or his heirs, and three fourths to the charity. *Held*, that these provisions would make the executor a trustee of that portion of the estate which was part of the firm's capital, so long as testator's son or any of his children should desire, and that this is obnoxious to the rule against perpetuities; that consequently one fourth



vested immediately in the son and three fourths in the charity. *Hamlin v. Mansfield*, 33 Atl. Rep. 788 (Me.).

It would seem that an equitable fee vested immediately in the charity in this case, subject to the provisions in regard to the partnership. If so, the rule against perpetuities could have no application, except under the erroneous doctrine of *Stade v. Patten*, 68 Me. 380, by which perhaps the court felt bound. The provisions for the firm, while not enforceable against the equitable owner, might well have been permitted at the discretion of the trustee. The only remote gift is the one fourth to the son or his heirs, since it may not vest for two lives. This gift the court gives effect to, so that the case seems wrong on all points.

PROPERTY—TENANT FOR LIFE AND REMAINDERMAN—PAYMENT OF CHARGE ON INHERITANCE.—H. devised two houses, subject to a mortgage, to his wife C. for life, remainder to his children equally. C. expended a part of the rents in discharging the mortgage, and died. Her executor claims the amount so spent from the trustees of H.'s will, the houses having been sold under its provisions. *Held*, the fact that the relation of parent and child subsisted between C. and the remaindermen does not rebut the presumption that she intended to keep the charge alive for her own benefit. *In re Harvey*, [1896] 1 Ch. 137.

The rule followed has grown up despite the fact that a large proportion of future estates created are, as matter of common knowledge, similar to the above, and the decision would seem correct. The rule may be traced through *Jones v. Morgan*, 1 Bro. C. C. 206, 218; *St. Paul v. Lord Dudley*, 15 Ves. 167; *Burrell v. Lord Egremont*, 7 Beav. 205; and (dictum) *Morley v. Morley*, 5 D. M. & G. 610, 626. Certain expressions in the latter case may justify the defendants' contention. The present decision fails to state whether there was an assignment of the claim, losing sight of a distinction touched upon in the earlier cases. The passage quoted by A. L. Smith, L. J., would seem to indicate that there was not. As to estates tail, see *Jones v. Morgan* (*supra*), *St. Paul v. Lord Dudley* (*supra*), and 1 Story, Eq. Jur., 12th ed. c. 8, § 486.

PROPERTY—WATER—SPRING—OWNERSHIP.—Defendant came on plaintiff's land and carried away water from plaintiff's spring. *Held*, plaintiff had such property rights in the water as to entitle him to recover damages. *Metcalf v. Nelson*, 65 N. W. Rep. 911 (S. D.).

The point came up squarely, as the plaintiff sued for damages for the value of the water rather than to pursue his certain remedy of trespass. The few English authorities reach a contrary conclusion. They go on the ground that property in spring water is analogous to property in air and wild animals, and that title can be acquired only by occupancy; the owner of the reality having merely a usufructuary interest. The last English decision is that of *Race v. Ward*, 4 E. & B. 703 (1855). See also 2 Blackstone, 14, 18; *Year Book*, Trin. 15 Ed. IV. 29, case 7; *Manning v. Wassdale*, 5 A. & E. 758. The principal case seems to be the only one where the question has arisen in the United States. The conclusion is a desirable one, and the case would doubtless be followed. Perhaps it can be reconciled with the English decisions, as it assumes that the spring was formed by percolating waters, while the English cases assume that a spring is the outlet of an underground channel. Both the English and American courts recognize a distinction between rights in percolating waters and those flowing in an underground channel. The authorities are collected in 64 Am. Dec. 727-730.

TORTS—ASSAULT—RIGHT OF ACTION IN PARTY CONSENTING TO AN ABORTION.—Defendant induced plaintiff to submit to an attempted abortion by a physician procured by plaintiff. Plaintiff's health was thereby seriously injured, and she sued defendant for damages. *Held*, her consent to the act deprived her of a right to recover civil damages therefor. *Goldamer v. O'Brien*, 33 S. W. Rep. 831 (Ky.).

It is doubtful whether in our law there are any general principles applicable to the right of a party to recover damages for the results of a criminal act to which he has consented. Consent to the destruction of property, under circumstances making the destruction criminal, would doubtless prevent a civil recovery by the owner. Consent to seduction is a bar to a civil suit by the party seduced. On the other hand, consent to the battery involved in a fist-fight is, by the great weight of authority, no defence to a civil action by either of the parties against the other. It is said the latter is a breach of the peace, something so abhorrent to the law that consent to it is void on public grounds. This is an excellent reason for severe criminal punishment, doubtless, but it is perhaps not quite clear how the public weal is benefited by allowing a willing party to a criminal act to recover for the consequences of his own law-breaking. If it be sound law, however, to allow a principal in a prize-fight to salve his injuries at his adversary's expense, public policy would seem to demand even more strongly the same privilege for the victim of a criminal operation. The Kentucky court recognizes the

similarity of the two cases, and criticises the decisions allowing mutual actions to prize-fighters.

**TORTS — MALICIOUS PROSECUTION OF A CIVIL ACTION.** — *Held*, an action will lie for malicious prosecution of a civil suit without arrest of the person or attachment of property. *Lipscomb v. Shofner*, 33 S. W. Rep. 818 (Tenn.). See NOTES.

**VOLUNTARY ASSOCIATIONS — RESIGNATION.** — The defendants were the governing committee of an association formed to provide for the legal assistance of the members when necessary, and the plaintiff sought an injunction to prevent them from depriving him of membership. The plaintiff had offered his resignation, but had withdrawn it before any action was taken. No club rule on resignation existed. *Held*, (by Court of Appeal), assuming there was jurisdiction, the notification by the plaintiff when received by the committee was an election to resign, from which he could not retreat. *Finch v. Oake*, 12 *The Times Law Reports*, 156.

The English courts do not recognize voluntary associations as such. *Hector v. Flemyng*, 2 M. & W. 172. But they recognize that a relationship of some kind exists among the members by uniformly entertaining suits to prevent expulsions contrary to the club rules or the laws of the land. *Labouchere v. Earl of Wharnclyffe*, 13 Ch. D. 346; *Baird v. Wells*, 44 Ch. D. 661, 670; and compare *Rigby v. Connol*, 14 Ch. D. 482. No authority on the precise point has been found, and the court mentions none. The decision, however, is probably correct, making the relation of a member to the organization like that of a party to a contract terminable on notice, or perhaps that of a continuing guarantor. *Offord v. Davies*, 12 C. B. N. S. 748. If a provision is made by the rules that a resignation must be accepted to be complete, that of course settles the matter, and possibly, in an organization distinctly social, that provision might be considered to be impliedly assented to by the members.

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## REVIEWS.

**THE WORKS OF JAMES WILSON.** Edited by James DeWitt Andrews. Chicago: Callaghan & Co. 1896. 2 vols. pp. xlv, v, 577, 623.

The present edition in two large volumes, in clear type, with copious notes and index, is in striking contrast to the three modest little octavo volumes, containing merely the unembellished text of Mr. Justice Wilson's writings, which formed the original edition of 1804. The lectures which are collected in these volumes are those which the author prepared, and in great part delivered, at the University of Pennsylvania in the years 1790-91 and 1791-92. He had contemplated a three years' course; but his third series of lectures was never even prepared, so that his published work fails to cover the whole framework of the law. In addition to the lectures, there are included in this edition, as in the former one, his speech in defence of the Constitution before the Pennsylvania Convention (1787), his masterly argument on the power of Congress under the Articles of Confederation to incorporate the Bank of North America, together with one or two other speeches, and fragments of essays. Several speeches published in the original edition are justly deemed of insufficient importance to justify reprinting.

The value of his work is chiefly historical. The fact that his scheme of lectures was never completed, and the additional fact that his arrangement and treatment is colored by his training in the civil law, militate of course against its use as a text-book. Its historical value lies chiefly in the author's attitude on certain constitutional questions. He anticipated by many years the conclusions reached by the United States Supreme Court as to the nature of a grant of land and of a corporate charter, and, what is most to his credit, he had already taken the position, more than



three quarters of a century before the Legal Tender Cases were decided, that the United States, even under the Articles of Confederation, were invested with powers which were inherent in sovereign nations, and impossible of exercise by any individual State, although not granted by the Articles. As authority for these propositions, the book is superseded by United States Supreme Court decisions; but as an exemplification of the views held by the framers of our Constitution as to its proper interpretation, and so as a basis for the later decisions, it must remain valuable.

Little fault is to be found with the substance of Mr. Andrews's work as editor. He spares us unnecessary notes, and his notes where inserted are helpful, and properly appreciative of the scope and importance of the author's propositions. The main body of the text bears testimony to careful proof-reading; but not infrequently typographical errors mar the foot-notes; and exception may be taken to such vague references as "See Pollock Maitland's [*sic*] History of the English Laws" (vol. i. p. 440); and "See Appendix" (vol. i. p. 545), where the appendix meant is that at the end of the second volume.

E. R. C.

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THE LAND LAWS. By Sir Frederick Pollock, Bart. Third Edition. Mac-Millan & Co., London and New York. 1896. pp. x, 233.

To those who have read the book in the past this new edition will surely be welcome. For those who have yet to make its acquaintance, there is a fresh delight in store. Sir Frederick Pollock has a faculty for investing the driest of matters with interest. Take for example his amusing yet accurate account of "suffering a recovery," where Brian and Littleton are in colorable litigation, and Catesby, the so-called "vouchee," accommodatingly ends the affair by surreptitiously "departing in contempt of court." A student could not desire a more agreeable introduction to the technical treatises on the law of real property; nor need the lay reader fear longer to find the subject of land laws "caviare to the general."

The important changes from former editions include a thorough revision of the chapter on "Early Customary Law," and the addition of a note dealing with the "Origins of the Manor" in the light of recent research. In this note, Sir Frederick commits himself to neither the "villa" nor the Germanic theory. The alterations in the account of early customary law were made necessary by a frank change of attitude as to the nature of "folk-land." It is no longer described as *ager publicus*, land held by the nation for public purposes, (see 1st ed., p. 20,) but rather as "land held by folk-right or customary law," in contrast to "book-land," which was "held in several property under the express terms of a written instrument." Strangely enough, this view is a return to one advanced two hundred years ago, and owes its present acceptance to the researches of a Russian, Mr. Vinogradoff.

Very naturally, there are many additions to the chapter on "Modern Reforms and Prospects." Several recent statutes are described, noticeably the copyhold act of 1894. The Torrens Land Transfer System is dealt with very briefly and in a non-committal way, though it is quite evident that in so far as the system does away with the possibility of "adverse possession" of registered land, and the operation of the statute of limitations, it is displeasing to the author. The abolition of primogeniture and a radical simplification of the law governing the settlement of estates, are said to be prospects the realization of which is not far off. In

an allusion to the radical reforms effected in the land laws in the last sixty years, Sir Frederick says, with characteristic humor and terseness: "Lord St. Leonards would have been in their eyes" (*i. e.* the Real Property Commissioners of 1829) "a rash innovator, Lord Cairns a revolutionist, and for Lord Halsbury parliamentary language would have failed them." The closing paragraph refers with much quiet satisfaction to the defeat of the socialistic candidates in the last Parliamentary elections.

E. R. C.

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OUTLINES OF LEGAL HISTORY. By Archer M. White, Barrister-at-Law. London: Swan Sonnenschein & Co., Lim. New York: MacMillan & Co. 1895. pp. xvi, 251.

Of the three works on English Legal History that have appeared within a half-year, this little volume by Mr. White undoubtedly covers the most ground, but is nevertheless primarily intended for the smallest class of readers. Mr. Inderwick in "The King's Peace" has given a sketch of the higher English courts. He traces their development in connection with the growth and changes in the customs and dealings of the people. "The History of English Law before the Time of Edward I., by Pollock and Maitland, covers the whole field of early English law in an unusually exhaustive and scholarly manner. This volume of Mr. White's covers the ground of both the other works, though necessarily in the briefest manner possible, and then continues in new fields. Beginning with a brief description of the important features of the English judicial system of to-day, it proceeds to a history of the origin and evolution of the major courts, devotes a short chapter to the minor and obsolete courts, and considers the Saxon system, "the cradle of the English law," and the changes and distinctions between it and the Norman system. The last and longest chapter is a chronological summary of leading principles and topics of the law, including sections on constitutional matters, equity, and criminal law. Each topic is treated tersely by itself, and traced from its origin through its important changes. The bare mention that all this information is compressed into less than 250 small pages will indicate that the book can be neither easy reading nor an exhaustive history. It is intended to aid English law students in preparing quickly for their Bar Trial Examination in Legal History. In fulfilling this end, it becomes so condensed and methodical as to be rather a syllabus or compendium than a literary work. The fact that it is a text-book cannot be forgotten. Therefore, it will not attract the casual lay reader. The young student, however, will be delighted with it, as a better summary of the subject than he could possibly prepare. And as there is no other work which covers even superficially the whole extent of this little volume, it will appeal to many an older student of law and legal history as a handy reference manual.

H. C. L.

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A MANUAL OF ELEMENTARY LAW. By William P. Fishback, Dean of the Indiana Law School. Indianapolis and Kansas City: The Bowen-Merrill Company. 1896. pp. xxvii, 467.

Owing to the considerable number of works of this nature already before the public, it may be doubted whether there is room for another. But, disregarding this question, the small volume by Mr. Fishback has in its field undoubted merit. It briefly but interestingly summarizes the well



settled principles of American law. No proposition is laid down which is not supported by adequate authority. Consequently only the broad principles which underlie the various branches of the law are explained. The work has no place in the library of an advanced student. Its usefulness is limited to those who are little more than beginners, and to the great class of laymen who find it advantageous to have a limited knowledge of law. The author claims no more. He pretends to no originality, except that he uses simple language, which will appeal to beginners and inspire them to the more technical study that is required of the practitioner. In this avowedly limited character the volume should meet with success.

H. C. L.

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SUMMARY AND INDEX OF LEGISLATION BY STATES IN 1895. New York State Library Bulletin: Legislation No. 6. Albany. 1896. pp. 310.

The Sixth Annual Bulletin of Legislation (1895) contains over 4,500 titles in the summary, a complete subject index, and a table of recent constitutional amendments—proposed, accepted, and rejected. The last feature is introduced this year for the first time. It is a most useful compilation of statutory changes and innovations, whether one be engaged in studying comparative legislation, or in merely keeping track of alterations in the statutes of particular States. Often a glance at the summary will obviate entirely the necessity of consulting the State statute-book for the provisions of a statute. The increasing estimation in which these annual bulletins of legislation are held is well earned.













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